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(18,848.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 620.

ISABELLA GONZALES, APPELLANT,

vs.

WILLIAM WILLIAMS, UNITED STATES COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 2, 1903.

1 To the honorable the United States circuit court, southern district of New York:

The petition of Domingo Collazo, in behalf of Isabella Gonzalez shows that:

1st. That Isabella Gonzalez is imprisoned or restrained in her liberty in Ellis island, N. Y. illegally.

2nd. That she has not been committed, and is not detained by virtue of any judgment, decree, final order, or process specified in section 2016 of this act.

3d. The cause or pretence of the imprisonment or restraint, according to the best knowledge and belief of the petitioner is that inasmuch as she is a native of Porto Rico, and arrived in the city of New York on steamship "Philadelphia" from Porto Rico August 4th, 1902, that she has not the right to land, that she is treated as an "alien immigrant" and she is informed and believes that she is likely to become a public charge, and that the board of special inquiry, held at the United States immigration station, Ellis island, New York harbor, have refused to permit her to land, whereas, as she is advised and believes, the said Isabella Gonzalez has the right to land here, that she should not be treated as an "alien immigrant" and that she is not likely to become a public charge, and that the law, if it be law, under which the said Isabella Gonzalez has been detained, is unconstitutional, wherefore your petitioner prays that a writ of *habeas corpus* and certiorari issue directed to the superintendent and commissioner of immigration commanding him to produce the body of Isabella Gonzalez and to certify the cause of her detention as stated in the writs therefor, and that petitioner may have such other and further relief as may be just and proper.

2 Dated this the 18 day of August, 1902.

DOMINGO COLLAZO.
LE BARBIER & PARKER,
Attorneys for Petitioner, 120 Broadway, New York City.

Domingo Collazo, being duly sworn, doth depose and say, that the facts set forth in the above petition, subscribed by him are true.

DOMINGO COLLAZO.

Sworn to before me, this 18th day of August, 1902.

MARION T. PRANKARD,
Notary Public (57), *Kings County.*

Certificated filed in N. Y. county.

(Endorsed:) United States circuit court, southern district of N. Y.—*In re* petition in behalf of Isabella Gonzales, for writ of *habeas corpus* and certiorari.—Petition for *hab. corpus.*—Le Barbier & Parker, att'ys for petitioner, 120 Broadway, N. Y. city.—Charles E. Le Barbier, advocate, of counsel.—U. S. circuit court, southern district of New York. Filed Aug. 19, 1902. John A. Shields, clerk.

1—620

3 The President of the United States of America to William Williams, Esq., commissioner of immigration at New York city, N. Y., Greeting:

Hab. corpus to bring up person.

We command you, that you have the body of Isabella Gonzalez, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Isabella Gonzalez is called or charged before me or any of the judges of the United States circuit court for the southern district of New York at a stated term thereof to be held at the United States circuit court, southern district of New York, Post-office building, New York city (Manhattan) on Wednesday August 20th, 1902, at half past ten o'clock a. m. to do and receive what shall then and there be considered concerning her and have you then there this writ.

Witness: Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the U. S. at the city of New York, the nineteenth day of August, one thousand nine hundred and two.

JOHN A. SHIELDS, *Clerk.*

LE BARBIER & PARKER,
Att'ys for Petitioner, 120 *Broadway, New York City.*
CHAS. E. LE BARBIER, *Advocate.*

4 (Endorsed:) The within writ is hereby allowed. Dated N. Y. Aug. 19, 1902. Geo. B. Adams, U. S. judge. The hearing on the within writ is hereby adjourned until September 3, 1902 same time and place and the petitioner in the meanwhile is paroled. Dated N. Y. Aug. 20, 1902. Edward Van Ingen, counsel to com'r of immigration. It is so ordered N. Y. Aug. 20, 1902. E. H. Lacombe, U. S. C. J.—At request of respondent the hearing of within writ is hereby further adjourned to September 17th, 1902 same time and place, same conditions. Dated N. Y. Sept. 2, 1902. Edward Van Ingen, counsel to commissioner.—It is so ordered. Dated N. Y. Sept. 2, 1902. Geo. B. Adams, U. S. judge.—U. S. circuit court, southern district of New York, Filed Oct. 7, 1902, John A. Shields, clerk.

5 The President of the United States of America to William Williams, Esq., commissioner of immigration, Greeting:

[L. S.]

Certiorari to certify cause of detention.

We command you, that you certify fully and at large to me, or one of the judges of the United States circuit court for the southern district of New York, to be held at the Post-office building, Manhattan, New York city, on Wednesday August 20th, 1902, at half past ten o'clock a. m. The day and cause of the imprisonment of Isabella Gonzalez by you detained; as is said, by whatsoever name the said Isabella Gonzalez shall be called or charged; and have you then this writ.

Witness: Hon. Melville W. Fuller, Chief Justice of the Supreme Court, of the United States at the city of New York, the nineteenth day of August, 1902.

JOHN A. SHIELDS, *Clerk.*

LE BARBIER & PARKER,
Att'ys for Petitioner, 120 *Broadway, New York City.*
CHARLES E. LE BARBIER, *Advocate.*

(Endorsed:) The within writ is hereby allowed. Dated N. Y. Aug. 19, 1902. Geo. B. Adams, U. S. judge.—U. S. circuit court, southern district of New York, Filed Oct. 7, 1902, John A. Shields, clerk.

6 United States Circuit Court, Southern District of New York.

In the Matter of ISABELLA GONZALEZ.

STATE OF NEW YORK, } ss:
County of New York, }

William Williams, being duly sworn, says, that he is the United States commissioner of immigration at the port of New York.

That Isabella Gonzalez, is, as deponent is informed and believes, an alien immigrant, a native-born inhabitant of the island of Porto Rico, who has not been naturalized and is not a citizen of the United States or of any State thereof; that she arrived at the port of New York from Porto Rico on the steamship "Philadelphia" on August 24th, 1902, and was detained at the Ellis Island immigrant station, and was duly examined by a board of special inquiry, duly constituted in accordance with section 5 of the United States statute of March 3, 1893, and after due consideration, the said board of special inquiry, by a unanimous decision, rendered as by said statute provided, excluded her from admission into the United States upon the ground that she was liable to become a public charge.

That annexed hereto are copies of the minutes of said board of special inquiry relating to the examination of the case of said immigrant.

7 That no appeal was taken from the decision of said board of special inquiry to the commissioner general of immigration.

That on the 20th day of August, 1902, when the writ of *habeas corpus* and *certiorari* were served herein, the said immigrant was detained as above mentioned at the Ellis Island immigrant station, and that she is now paroled in the custody of her counsel, Charles E. Le Barbier, Esq., under order of this court.

WM. WILLIAMS.

Sworn to before me this 16th day of September, 1902.

LAWRENCE P. LEE,
[SEAL.] *Notary Public, N. Y. Co.*

8 In the Matter of ISABELLA GONZALEZ, Aged 20, Native of Porto Rico, ex S. S. "Philadelphia," August 4, 1902, Alien Immigrant.

Present: Weihe, chairman; Wright, Holman, Semsey, inspectors.

Gonzalez, Isabella, f., age 20, native of Porto Rico; ex S. S. Philadelphia 8/4. Pregnant.

Widow; have a daughter in Porto Rico. Paid my own passage; never here before; shows $11; going to brother Louis Gonzalles, Linoleumville, Staten island. I sent telegram. Deferred.

F. N. CHASE, *Secretary.*

9 At a meeting of the board of special inquiry, held at the Ellis Island immigrant station, on the 5th day of August, 1902.

Present: Weihe, chairman, Wright, Holman, Semsey, inspectors. E. B. Holman, secretary.

Deferred Matter of ISABELLA GONZALLES, Pregnant, Native of Porto Rico, Arrived ex S. S. "Philadelphia," Aug. 4th, 1902.

DOMINGO COLASCO, a witness, appeared and having been first duly sworn, testified as follows:

My name is Domingo Colasco, I reside in 163 St. Nicholas Ave, New York city.

(By Insp. SEMSEY:)

Q. Who do you want?
A. Isabella Gonzalles.
Q. What relation is she to you?
A. My wife is her aunt.
Q. Is your wife in America?
A. Yes, sir.
Q. What is your business?
A. I am a printer.
Q. How much do you make a week?
A. $25 a week.
Q. How long have you been in America?
A. 15 years.
Q. Are you a citizen?
A. Yes, sir.
Q. Are you willing to take her and provide for her?
A. Yes, sir.
Q. Is she going to stay in your house?
A. Yes, sir.

(By Insp. HOLMAN:)

Q. Where is her husband?
A. He is on Staten island, working in a linoleon factory.
Q. Why did he not come here for his wife?
A. He will come to my house.

10 Q. How do you know, when did you see him?
A. This boy here with me is her brother.

(By the CHAIRMAN:)

Q. Why don't her husband come here for her?
A. Because he is working there, he is working out, he is working in a linole*on* factory.

(By Insp. WRIGHT:)

Q. How long has her husband been here?
A. About six months.
Q. When did you see her husband?
A. About two weeks ago. He is working and could not come to-day.

Insp. SEMSEY: But his wife is here and he should come for her. I move to take no action.
Unanimously, no action taken.

11 At a meeting of the board of special inquiry, held at the Ellis Island immigrant station, on the 7th day of August, 1902.
Present: Weihe, chairman; Wright, Holman, Semsey, inspectors (E. B. Holman, secretary).

Deferred Matter of ISABELLA GONZALLES, Aged 20, Native of Porto Rico, Arrived ex S. S. "Philadelphia" Aug. 4th, 1902.

LOUIS GONZALLES, a witness, appeared and having been first duly sworn, testified as follows:
My name is Louis Gonzalles, I reside in Linoleumville, Staten island, N. Y.

(By Insp. SEMSEY:)

Q. Do you know this woman's husband?
A. They are not married. It is very difficult for us to bring the man here, but I have been to the church and have made arrangements and as soon as I have my sister with me, we are going there and are going to have them married. I have also gone to the authorities and told them and everything is waiting for the release of my sister.

(By the CHAIRMAN:)

Q. Why does he refuse to come here?
A. Because he does not want to marry her.

(By Insp. WRIGHT:)

Q. An arrangement then has been made by which a marriage is to take place without the husband's consent?
A. My aunt, who is here with me, has made arrangements and is sure of making a reconciliation by taking my sister to her house and will have them married.

(By Insp. WRIGHT:)

Q. What relation are you to this woman?
A. I am her brother.

12 (By the CHAIRMAN:)

Q. Do you know whether or not the intended husband sent for this woman?
A. No, he did not.

(By Insp. HOLMAN:)

Q. How long has this intended husband been in this country?
A. 3 months.
Q. What is his occupation?
A. He is working in a lineoleon factory.

Mrs. DOMINGO COLASCO (or Colazo:) I live in No. 163 St. Nicholas Ave., New York city.

(By Insp. HOLMAN:)

Q. Your husband was here and testified?
A. Yes, sir.
Q. What relation are you to this woman?
A. Aunt.

(By Inspr. WRIGHT:)

Q. What does your husband do?
A. He is a topographer and I do embroidery work; I also give lessons in embroidery work.
Q. What is your husband's business worth?
A. $25 a week.
Q. Does your husband know that you came here in the interest of your niece?
A. Yes, sir.
Q. Can you satisfy this board that, in case this woman is released, you will stand by her and see that she does not get into trouble?
A. Yes, sir, that goes without the saying.
Q. Your husband will aid you in assisting the woman?
A. Yes, sir.

Insp. Holman moved to exclude as likely to become a public charge.

Unanimously excluded as likely to become a public charge.

(A copy.)

E. B. HOLMAN, *Sec.*

13 (Endorsed:) U. S. circuit court, southern district of N. Y.—In the matter of Isabella Gonzalez.—Return to writ of certiorari.—Edward Van Ingen, counsel for William Williams, U. S. commissioner of immigration at the port of New York, 49 Wall St. Manhattan, New York city. U. S. circuit court, southern district of New York, Filed Oct. 7, 1902, John A. Shields, clerk.

14 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms in the borough of Manhattan, in the city of New York, on Wednesday the 17th day of September in the year of our Lord one thousand nine hundred and two—

Present: The Honorable E. Henry Lacombe, circuit judge.

In the Matter of the Petition of ISABELLA GONZALEZ for a Writ of *Habeas Corpus*.

Now comes the petitioner by Charles E. Le Barbier, Esq. for the motion Likewise comes the respondent by Edward Van Ingen Esq. in opposition. After hearing the argument of counsel, decision is reserved.

15 United States Circuit Court, Southern District of New York.

In the Matter of the Petition of ISABELLA GONZALEZ for a Writ of *Habeas Corpus*.

LACOMBE, *Circuit Judge:*

Petitioner, an unmarried woman, is a native of Porto Rico, twenty years of age, who arrived here from that island on August 24, 1902. She was detained at Ellis Island immigrant station, was duly examined by a board of special inquiry and was excluded from admission into the United States upon the ground that she was liable to become a public charge.

The only question open for discussion on this application is whether or not petitioner is an alien. Upon all other questions the decision of the appropriate immigration officers, when adverse to the admission of the alien is made final, unless reversed on appeal to the Secretary of the Treasury. Act of Aug. 18th 1894 (28 Stat. p. 390). It is true that this court held to the contrary *In re* Martorelli 63 F. R. 437, following *In re* Panzara 51 F. R. 275, but the act of 1894 was not before it. The Martorelli case was decided in October 1894 before the statutes of that year were published.

The fourteenth amendment to the Constitution provides that all persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States.

16 It is not disputed that petitioner was by birth an alien, unless in some appropriate way she has since been naturalized, she is still an alien. There is no suggestion that she was ever naturalized under the general laws prescribed by Congress regulating the admission of aliens to citizenship. The treaty of Paris, unlike earlier treaties which dealt with the Louisiana and Florida purchases, with California and with Alaska, did not undertake to make the native-born inhabitants of Porto Rico citizens of the United States. It expressly provided that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United

States shall be determined by the Congress." In conformity with this provision of the treaty it was provided in the act of 1900 (chap. 191 sec.).

"That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, 1899, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States (excepting such as had preserved their allegiance to Spain), and they, together with such citizens of the United States as may reside in Porto Rico, shall continue a body politic under the name of the people of Porto Rico, with governmental powers as hereinafter conferred and with power to sue and be sued as such."

This legislation has certainly not operated to effect a naturalization of the petitioner as a citizen of the United States. Being foreign born and not naturalized she remains an alien and subject to the provisions of law regulating the admission of aliens who come to the United States.

The writ is dismissed.

Oct. 7, 1902.

17 (Endorsed:) Circuit court of the United States, for the southern district of New York.—In the matter of the petition of Isabella Gonzalez for a writ of *habeas corpus*.—Opinion, Lacombe, C. J.—U. S. circuit court, southern district of New York, Filed Oct. 7, 1902, John A. Shields, clerk.

18 At a stated term of the circuit court of the United States for the southern district of New York, held at the Post-office building in the borough of Manhattan, city of New York, on the 18th day of October, 1902.

Present: The Honorable E. Henry Lacombe, jndge.

In the Matter of the Petition of ISABELLA GONZALEZ for a Writ of *Habeas Corpus*.

A writ of *habeas corpus* issued by this court on or about the 19th day of August, 1902, having been duly served upon William Williams, United States commissioner of immigration at the port of New York, commanding him to produce the above-named Isabella Gonzalez before this court on the 20th day of August, 1902, and to make return to this court of the cause of her detention, and the matter having been adjourned to the 17th day of September, 1902, and the said Isabella Gonzalez having been paroled under order of this court in the custody of her counsel Charles E. Le Barbier, Esq., and the matter having come on to be heard on the 17th day of September, 1902, now, upon reading and filing the petition of Domingo Collazo on behalf of said Isabella Gonzalez, praying for the above-mentioned writ and the return to said writ made by said William Williams, United States commissioner of immigration, verified the 16th day of September, 1902, and after hearing Charles

E. Le Barbier, Esq., of counsel for said petitioner, and William B. Anderson, Esq., counsel for said United States commissioner
19 of immigration, and upon motion of Edward Van Ingen, attorney for said William Williams, as United States commissioner of immigration, it is

Ordered that said writ of *habeas corpus* be and the same hereby is dismissed and that said Isabella Gonzalez be and she is hereby remanded to the custody of William Williams, United States commissioner of immigration at the port of New York.

(S'd) E. HENRY LACOMBE, *U. S. C. J.*

(Endorsed:) U. S. circuit court, southern district of N. Y.—In the matter of Isabella Gonzalez.—Order dismissing writ of *habeas corpus*.—Edward Van Ingen, attorney for William Williams, U. S. commissioner of immigration at the port of New York, 49 Wall St., Manhattan, New York city.—U. S. circuit court, southern district of New York. Filed Oct. 18, 1902, John A. Shields, clerk.

20 United States Circuit Court for the Southern District of New York.

In the Matter of the Petition of ISABELLA GONZALEZ for a Writ of *Habeas Corpus*.

A motion coming on duly to be heard upon the calendar of this court of Nov. 14th, 1902, for the parole of the relator in the custody of Charles E. Le Barbier pending the hearing and determination of the appeal herein, and after hearing Charles E. Le Barbier Esq., of counsel for the petitioner, in support of the motion, and Edward H. Van Ingen, Esq., attorney for respondent, appearing but not opposing, and good cause having been duly shown therefor, now upon motion of Le Barbier & Parker, attorneys for petitioner, it is

Ordered that Isabella Gonzalez be and she hereby is paroled in the custody of her counsel, Charles E. Le Barbier, until the final disposition of the appeal about to be taken by the petitioner from the order of this court, entered herein on the 18th day of October, 1902, or, if no such appeal be taken until the expiration of the time to take such appeal.

E. H. LA COMBE,
U. S. Circuit Judge.

Approved as to form.
EDWARD VAN INGEN,
Attorney for Comm. of Immigration.

(Endorsed:) United States circuit court, southern district of N. Y.—In the matter of the petition of Isabella Gonzalez for a writ of *habeas corpus*.—Order.—Le Barbier & Parker, att'ys for petitioner, No. 120 Broadway, New York city.—U. S. circuit court, southern district of New York, Filed Dec. 9, 1902, John A. Shields, clerk.

21 Circuit Court of the United States, Southern District of New York.

In the Matter of the Petition of ISABELLA GONZALES for a Writ of *Habeas Corpus*.

Please take notice, that Isabella Gonzales, the petitioner above named, hereby appeals to the Supreme Court of the United States from the final order entered herein in the office of this court on the 28 day of October, 1902, dismissing the writ of *habeas corpus* and remanding her to the custody of the United States commissioner of immigration at the port of New York.

Dated New York, January 15th, 1903.

LE BARBIER & PARKER,
Attorneys for Petitioner, 120 *Broadway, Manhattan,*
New York City, N. Y.

To Edward Van Ingen, Esq., attorney for United States commissioner of immigration.

To John A. Shields, Esq., clerk.

22 Circuit Court of the United States, Southern District of New York.

In the Matter of the Petition of ISABELLA GONZALES for a Writ of *Habeas Corpus*.

To the Supreme Court of the United States of America:

The petition of Isabella Gonzalez respectfully shows:

That your petitioner came to the port of New York from Porto Rico on the 24th day of August, 1902; that upon her arrival she was detained at the emigrants' station, located at Ellis island, was examined by a board of special inquiry, was excluded from admission into the United States and was held in custody by the commissioner of immigration; that thereupon upon a petition duly verified by your petitioner, a writ of *habeas corpus* was duly issued out of and under the seal of the circuit court of the United States, held in and for the southern district of New York; that the said court after a hearing had upon the return made to the said writ entered an order dismissing the writ sued out by your petitioner and remanding her to the custody of William Williams, United States commissioner of immigration, at the port of New York. That your petitioner has been remanded to the custody of such commissioner on the ground she is an alien and therefore subject to the immigration laws of the United States. That your petitioner denies that she is an alien and asserts her right to entry into the United States.

Wherefore, your petitioner feeling aggrieved by the said
23 order of the circuit court of the United States, held in and for the southern district of New York, appeals therefrom to the Supreme Court of the United States, and prays that such appeal may be allowed, and that a transcript of the said order and of the

proceedings in the said circuit court and of the return of the United States commissioner of immigration to the said writ of *habeas corpus* may be transmitted to the Supreme Court of the United States for the purpose of review.

Dated, New York, February 4th, 1903.

(S'd) ISABEL GONZALEZ, *Petitioner.*

LE BARBIER & PARKER,
Attorneys for Petitioner, 120 *Broadway,*
Manhattan, New York City, N. Y.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Isabella Gonzalez, being duly sworn, says, that she is the petitioner herein; that the foregoing petition is true to the best of her knowledge, information and belief.

(S'd) ISABEL GONZALEZ.

Sworn to before me this 4th day of February, 1903.

(S'd) EMILY L. PETERS,
[SEAL.] *Notary Public* (# 99), *N. Y. Co.*

The foregoing appeal is hereby allowed.

Dated New York February 16 1903.

(Signed) E. HENRY LA COMBE,
United States Circuit Judge.

24 Circuit Court of the United States, Southern District of New York.

In the Matter of the Petition of ISABELLA GONZALEZ for a Writ of *Habeas Corpus.*

Assignment of Errors.

The petitioner herein, hereby assigns errors in the rulings and proceedings of the circuit court herein, as follows:

The court erred:

First. In dismissing the writ of *habeas corpus.*

Second. In remanding the petitioner to the custody of William Williams, United States commissioner of immigration at the port of New York.

Third. In holding that the petitioner is lawfully detained by the said commissioner.

Fourth. In holding that the petitioner is subject to the provisions of the statutes of the United States regulating the admission of aliens.

Fifth. In holding that the petitioner is an alien.

Sixth. In holding that any objection could be lawfully interposed to her admission to the United States.

Seventh. In not directing that the petitioner herein be discharged

from the custody of the said commissioner and released from detention of any and every kind.

Dated, New York, January 15th, 1903.

LE BARBIER & PARKER,
Attorneys for Petitioner, 120 *Broadway*,
Manhattan, New York City, N. Y.

25 Circuit Court of the United States, Southern District of New York.

In the Matter of the Petition of ISABELLA GONZALEZ for a Writ of *Habeas Corpus*.

Know all men by these presents, that we, Isabella Gonzalez as principal, and Frederic R. Coudert, Jr., as surety, residing at 124 E. 56th street, in the city of New York, are held and firmly bo-nd unto the United States in the full and just sum of two hundred and fifty dollars, to be paid to the United States, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 16 day of February, one thousand nine hundred and three.

Whereas, lately at a circuit court of the United States for the southern district of New York, in the proceeding therein pending, an order was entered dismissing a writ of *habeas corpus* and remanding the petitioner to the custody of William Williams, United States commissioner of immigration at the port of New York; and the said petitioner being aggrieved thereby and having appealed therefrom to the Supreme Court of the United States:

Now the condition of the above obligation is such that if the said Isabella Gonzalez, the petitioner herein, shall prosecute said appeal with effect, and pay all costs which may be awarded against her if the appeal is not sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

ISABEL GONZALEZ.
FREDERIC R. COUDERT, JR.

Taken, acknowledged and subscribed before me this 16th day of February one thousand nine hundred and three.

[SEAL.]

EMILY L. PETERS,
Notary Public (*No.* 99), *N. Y. Co.*

26 UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

F. R. Coudert Jr. of New York city, being duly sworn, deposes and says, that he is worth more than five hundred dollars over and above all his just debts and liabilities.

F. R. COUDERT, JR.

Sworn to before me this 16th day of February 1903.
JAMES BARCLAY,
Notary Public, Kings County.
[SEAL.]

Certificate filed in N. Y. county.

Approved as to form, amount and sufficiency.
Dated New York, February 16 1903.
E. HENRY LA COMBE,
Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of New York. Filed Feb. 16, 1903, John A. Shields, clerk.

27 UNITED STATES OF AMERICA, ss:

To William Williams, Esq., United States commissioner of immigration at the port of New York:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, on the 13th day of March, 1903, pursuant to an appeal on the part of Isabella Gonzales, the petitioner herein, filed in the office of the clerk of the circuit court of the United States, held in and for the southern district of New York, in a certain suit or proceeding entitled In the matter of the petition of Isabella Gonzales for a writ of *habeas corpus*, to show cause, if any there be, why the decision of the said circuit court of the United States, in the said appeal mentioned, should not be reversed, modified or corrected, and speedy justice should not be done in that behalf.

Given under my hand at the city of New York in the southern district of New York, on the 16th day of February, one thousand nine hundred and three.

E. HENRY LACOMBE,
Circuit Judge.

LE BARBIER & PARKER,
Attorneys for Petitioner, 120 *Broadway*,
Manhattan, New York City, N. Y.
CHARLES E. LE BARBIER.

Due service of a copy of the above and foregoing citation is hereby admitted this 17th day of February, 1903.
EDWARD VAN INGEN,
Per W. B. M.

28 (Endorsed:) United States circuit court, southern district of New York. In the matter of the petition of Isabella Gonzalez for a writ of *habeas corpus*, &c.—Petition on appeal &c., and allowance of sale.—Assignment of errors and citation.—Le Barbier & Parker, attorneys for relator, No. 120 Broadway, New York city.—Due service of a copy of the within citation, assignment of errors, petition on appeal, bond and notice, is hereby admitted this 17th

day of February, 1903. Edward Van Ingen, attorney for U. S. commissioner of immigration. U. S. circuit court, southern district of New York, Filed Feb. 17, 1903, John A. Shields, clerk.

29 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to twenty-eight inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the cause entitled In the matter of the petition of Isabella Gonzalez for a writ of *habeas corpus* as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 26th day of February in the year of our Lord one thousand nine hundred and three, and of the Independence of the said United States the one hundred and twenty-seventh.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk.*

[Endorsed:] United States circuit court of appeals for the second circuit. In the matter of the petition of Isabella Gonzalez for a writ of *habeas corpus.* Transcript of record from the circuit court of the United States for the southern district of New York.

Endorsed on cover: File No. 18,848. S. New York C. C. U. S. Term No. 620. Isabella Gonzales, appellant, *vs.* William Williams, United States commissioner of immigration at the port of New York. Filed February 27, 1903.

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Office Supreme Court U. S.
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MAR 11 1903
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Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

ISABELLA GONZALES, *Appellant*,
vs.
WILLIAM WILLIAMS, United States Commissioner of Immigration at the Port of New York. } No. 622

MOTION TO ADVANCE.

UNITED STATES OF AMERICA, *ss:*

The appellant respectfully moves the Court to advance the above-entitled cause upon the docket and set it down for hearing during the month of April, 1903, or at such other early date during the present term, or during the October term, 1903, as shall be most convenient to the Court, on the ground, suggested in Rule 26, that said cause involves or affects some matter of general public interest, in that it involves the construction of the Constitution, the immigration laws of the United States, and the act of Congress approved April 12, 1900, known as the Foraker Act (Chap. 191, Rec. 7.)

This cause was brought in the United States Circuit Court for the Southern District of New York on the petition of Domingo Collazo, filed therein on or about the 19th day of August, 1902, on behalf of Isabella Gonzales, the appellant

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Livingston Middleditch Co., 65 Duane St. Telephone, Brick Supreme Court U. S.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 225

ISABELLA GONZALEZ,
Appellant,

AGAINST

WILLIAM WILLIAMS, UNITED STATES COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK.

Motion to re-assign.

Now comes the appellant herein and respectfully moves this Court for a continuance of the argument herein and a re-assignment of said cause for hearing upon such day subsequent to November 1st, 1903, as may be convenient to the Court.

On or about the 18th day of August, 1902, a petition for writ of habeas corpus and certiorari on behalf of the appellant was filed in the office of the Clerk of the United States Circuit Court for the Southern District of New York, wherein it was alleged that the appellant was illegally imprisoned or restrained of her liberty at Ellis Island, New York; that she had not been committed and was not detained by virtue of any judgment, decree, final order or process, and that the cause of the imprisonment or restraint to the best of her knowledge was that she was considered an alien immigrant and likely to become a public charge; and praying that a writ of habeas corpus and certiorari issue to the Super-

intendent and Commissioner of Immigration directing him to produce the body of the appellant and certify the cause of her detention. Such writs of habeas corpus and certiorari were duly allowed by U. S. Judge Adams on the 19th day of August, 1902. The United States Commissioner of Immigration made return thereto on the 16th day of September, 1902, and alleged that appellant was an alien immigrant, a native born inhabitant of the Island of Porto Rico who had not been naturalized and was not a citizen of the United States nor of any State thereof; that she arrived in the Port of New York from Porto Rico on August 24th, 1902, and was duly examined by a Board of Special Inquiry in accordance with §5 of the United States Statute of March 3rd, 1893, and after due consideration the said Board, by a unanimous decision, rendered as provided by said statute, excluded her from admission to the United States upon the ground that she was likely to become a public charge. Such writs coming on to be heard before U. S. Circuit Judge Lacombe, of the Southern District of New York, he decided that appellant being foreign born and not naturalized, remained an alien and subject to the provisions of law regulating the admission of aliens who come to the United States, and that therefore the writ should be dismissed. An order was entered in the office of the Clerk of the U. S. Circuit Court for the Southern District of New York on or about the 18th day of October, 1902, dismissing said writ of habeas corpus and remanding the appellant to the custody of the said United States Commission of Immigration. She was subsequently paroled in the custody of her counsel pending the disposition of the appeal from said order. From such order dismissing said writ of habeas corpus, the appellant has appealed to this Court, such appeal being allowed by U. S. Circuit Judge Lacombe on February 16th, 1903.

Upon motion of the Attorney-General, this cause was advanced and assigned to be heard in October, 1903. Upon inquiry at the office of the Clerk of this Court it has been ascertained that such cause will probably come on for hearing about the middle of October. Frederic

R. Coudert, Jr., is in personal charge of the preparation of the argument in this cause and will present the questions herein involved to this Court. That owing to poor health he was obliged to go abroad, where he is at the present time, and is not expected to return until the latter part of October, 1903.

For the reasons above stated, the appellant respectfully moves this Court that the hearing in this cause be continued and assigned to some day subsequent to November 1st, 1903.

We understand that the Honorable Attorney-General concurs in this motion.

Respectfully submitted,

CHARLES E. LEBARBIER,
Attorney for Appellant.

FREDERIC R. COUDERT, JR.,
of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 225.

ISABELLA GONZALEZ,
Petitioner-Appellant,

vs.

WILLIAM WILLIAMS, U. S. Commissioner of Immigration at the Port of New York.

Statement of the Case.

This is an appeal by Isabella Gonzalez from an order of the Circuit Court of the United States for the Southern District of New York dismissing a writ of *habeas corpus* and remanding petitioner-appellant to the custody of the defendant-appellee United States Commissioner of Immigration at the port of New York (Record, fol. 21).

The petition alleged that petitioner, Isabella Gonzalez, was a native-born inhabitant of Porto Rico and was such at the time of the proclamation of the Treaty of Paris (April 11, 1898), and that upon arriving from said island of Porto Rico on the 4th day of August, 1902, the said defendant had detained her in custody, pre-

vented her landing and was threatening to return her to Porto Rico (Record, fol. 1).

The return of the defendant to the writ of Habeas Corpus alleged that pursuant to the powers vested in him by the United States Immigration laws he had detained said Gonzalez as an "alien immigrant," in order that she could be returned as such in case it appeared probable that she might become a public charge (Record, fol. 6).

The Circuit Court dismissed the writ on the ground that the petitioner not having been born in the United States nor having ever been naturalized, retained the same status that she had before the cession of Porto Rico by the Treaty of Paris, consequently she was an alien and the Commissioner had jurisdiction to detain or deport her (Record, fols. 15-17).

The sole question here involved is the alienage of appellant.

If she is not an alien the Commissioner admittedly had no jurisdiction and the writ should not have been dismissed.

The law under which the Commissioner acted is as follows:

> United States Stat. at Large, Vol. 26, p. 1084 (Chapter 551) provide:
>
> "That the following classes of aliens shall be "excluded from admission into the United States "in accordance with the existing acts regulating "immigration other than those concerning Chinese "laborers: All idiots, insane persons, paupers or "persons likely to become a public charge. * * *
>
> "Section 8. That upon the arrival by water at "any place within the United States of any *alien* "*immigrants*, it shall be the duty of the command- "ing officer and the agents of the steam or sailing "vessel by which they came, to report the name, "*nationality*, last residence and destination of "every such alien before any of them are landed.

"* * * All decisions made by the inspection "officers or their assistants touching the rights of "any alien to land, when adverse to such right shall "be final unless appeal be taken to the Superin- "tendent of Immigration, whose action shall be "subject to review by the Secretary of the Treas- "ury. It shall be the duty of the aforesaid offi- "cers and agents of such vessel to adopt due precau- "tions to prevent the landing of any alien immi- "grant at any place or time other than that desig- "nated by the inspection officers, and any such "officer or agent or person in charge of such vessel "who shall either knowingly or negligently land "or permit to land any alien immigrant at any "place or time, etc.

"Section 10. That all aliens who may unlaw- "fully come to the United States shall, if practi- "cable, be immediately sent back on the vessel by "which they were brought in. * * *

"Section 11. That any alien who shall come into "the United States in violation of law may be re- "turned as by law provided, etc."

Introduction.

This case is noteworthy in that it involves much more than the liberty of an individual. The answer to the question whether or not petitioner is an alien must settle the status of all the native islanders who were in existence at the time the Spanish possessions were annexed by the United States.

The "Insular Cases" have not determined the question nor are any of the precedents to be found in our history precisely similar to the case of the Porto Rican *ante nati*. This is due to the difference in the nature of our recent acquisitions and those made formerly.

Of the Indian little need be said. Nomad tribes do not long survive the contact with civilization.

The populations taken over from France and Mexico were insignificant in number. They were, moreover, largely of Caucasian race and civilization, and a growing stream of immigration soon made the new lands thoroughly American. Moreover, the two civilizations were in fact equal or nearly so, and the treaties both of Paris (1800) and of Guadalupe Hidalgo (1848), recognized that fact by according to the new inhabitants the rights of American citizens. Thus the problem as to the legal status of the inhabitants of Louisiana and the territory acquired from Mexico was solved or solved itself *ab initio*. The underlying theory upon which both treaties were based was "expansion" rather than "imperialism."

But the problem of to-day cannot be solved either by extermination, as in the case of the Indian, nor by assimilation, as in the case of the few Frenchmen and Spaniards. Neither the methods of Miles Standish nor those of Jefferson will suffice us now. We must move on a heretofore untrodden path and find precedents upon which to base intelligent legislation and administration, not so much in our own history as in that of other nations who have preceded us in attempting to govern non-assimilable peoples.

In such an argument as this we must begin by defining the necessary terms, otherwise we will end as do many legal discussions in having with much clamor demolished a man of straw.

The object is to ascertain exactly what, under existing law, is the constitutional and legal status of the Porto Rican born before April 11, 1899. To call him a citizen when we are in hopeless disagreement as to the meaning of that term will only result in creating added confusion.

If the Circuit Court was correct, then we have to-day a new and seemingly paradoxical legal category of "American Aliens." The object of language is to denote objectively existing facts or relations. What idea the mutually exclusive term "American Aliens" can

convey it is difficult to say. The man without a country would thus be transferred from the realm of poetry into the domain of law, since an affirmance of the decision here appealed from would declare the law of the United States, as expounded by its highest tribunal, to be that there exists under the jurisdiction of the United States a large class of persons who are strangers and aliens here and in every other nation of the globe. There can be nothing in law or in fact to justify or necessitate so extraordinary a result.

Brief of the Argument.

I.—The petitioner-appellant cannot be sent back by the Immigration Bureau unless she is an "alien immigrant." If she does not fall within that class the statute cannot affect her; the Commissioner of Immigration had no jurisdiction, and the writ should have been sustained.

II.—The petitioner is not an alien because on April 11, 1899, she ceased to be a Spanish subject and her allegiance unquestioned, complete and permanent, was transferred to the Government of the United States by the Treaty with Spain proclaimed on that date.

This proposition is demonstrated by the following considerations:

(*a*) Allegiance is determinative of nationality or subjection. Our law of nationality, *i. e.*, the law which determines what persons are American nationals as contradistinguished from foreigners or aliens was derived from and must be examined in the light of the common law. That law makes nationality or subjection dependent upon allegiance.

(*b*) In the United States the tests as to what constitutes "nationality" or "subjection" are the same as the English common law. The problem has here been con-

fused, however, by the use of the word "citizen" in two senses. It is generally and properly used to indicate the holder of political rights or privileges in a State; as has been aptly said of a citizen in a democracy, "one who has a homeopathically diluted dose of sovereignty." Such persons may be accurately characterized as active citizens (burghers). The word has also been used in its broad sense as denoting all members of the nation and in this sense it has been considered as identical with subjection at the common law. Such persons may be characterized as passive citizens.

In our history there have been two apparent exceptions to the rule that passive citizenship and subjection are identical, and we have had persons who were neither citizens nor aliens. The free negroes under the Dred Scott decision were held by this Court not to be citizens, even in the general sense, yet they were not aliens but American nationals or subjects because their allegiance, complete and absolute was owing to the United States. Again, the Indian separated from his tribe was not considered a citizen, yet he could not well have been an alien, because he had no other allegiance than to the United States.

Elk v. *Wilkins,* 112 U. S., 94.
Kazzahoo v. *Adams,* 1 Dil., C. C.

The sole cases in which citizenship, in the latter sense, and subjection have not been identical are those of the free negro before the 14th Amendment.

The Porto Rican is, therefore, under our law, a subject or national—the only really debatable question being as to whether he is a citizen in the general sense, having the civil rights and status of such or whether he is a mere subject like the free negro and the Indian above mentioned. In no event is he an alien.

III.—The Judge at Circuit based his decision on the ground that the petitioner, not having been born in the United States, nor naturalized by the Treaty, must

have retained her original status just as though Porto Rico had not been annexed; consequently, she remained an alien. Granting the premises, the argument is fallacious in assuming that beause the petitioner is not a citizen, she is necessarily, and *ipso facto* an alien—no such alternative exists. The cession changed her allegiance. That fact is indisputable. The shifting of her allegiance changed her status from that of a Spanish national into an American national. The Court below overlooked the fact that there may be and have been subjects who are not citizens, and that the two are not necessarily exclusive terms. Hence his error. The treaty cession, if it did not *naturalize* the petitioner at least *nationalized* her.

IV.—This distinction between grades or classes of subjects or nationals is illustrated in the history of other countries. The French courts have held Algerians to be French subjects, in consequence of the *de facto* annexation of Algeria—although in the absence of legislation or treaty they could not be French citizens.

V.—A broad view of the Treaty leads to the conclusion that the natives were not only nationalized, but collectively naturalized by the cession.

ARGUMENT.

I.

Jurisdiction of the Immigration Commissioner.

The Commissioner could have no jurisdiction unless the petitioner were an alien. This is clearly stated by the learned Circuit Judge in the court below.

> "The only question open for discussion on this "application is whether or not petitioner is an

" alien. Upon all other questions the decision of " the appropriate immigration officers, when ad- " verse to the admission of the alien is made final, " unless reversed on appeal to the Secretary of " the Treasury. Act of Aug. 18, 1894 (28 Stat., " p. 390).

" It is true that this Court held to the contrary " *in re Martonelli*, 63 F. R., 437, following *in re* " *Panzara*, 51 F. R., 275, but the Act of 1894 was " not before it. The *Martonelli* case was decided " in October, 1894, before the statutes of that year " were published" (Rec., fols. 15-17).

II.

The cession of Porto Rico definitely transferred the allegiance of the native inhabitants from Spain to the United States.

The Treaty with Spain of December 10, 1898, provides that:

"Article II.

" Spain cedes to the United States the Island of " Porto Rico and other Islands now under Spanish " sovereignty in the West Indies, and the Island of " Guam in the Marianas or Ladrones."

"Article III.

" Spain cedes to the United States the arch- " ipelago known as the Philippine Islands, and " comprehending the Islands lying within the fol- " lowing line: * * *"

"Article IX.

" Spanish subjects, natives of the Peninsula, re- " siding in the territory over which Spain by the

"present treaty relinquishes or cedes her sover-
"eignty, may remain in such territory or may re-
"move therefrom, retaining in either event all
"their rights of property, including the right to
"sell or dispose of such property or of its proceeds;
"and they shall also have the right to carry on their
"industry, commerce and professions, being sub-
"ject in respect thereof to such laws as are applica-
"ble to other foreigners. In case they remain in
"the territory they may preserve their *allegiance*
"to the Crown of Spain by making, before a Court
"of Record, within a year from the date of the
"exchange of ratifications of this treaty, a declara-
"tion of their decision to preserve such allegiance;
"in default of which declaration they shall be held
"*to have renounced it and to have adopted the*
"*nationality of the territory in which they may*
"*reside.*"

"The civil rights and political status of the
"native inhabitants of the territories hereby ceded
"to the United States shall be determined by the
"Congress."

The treaty thus definitely accomplishes one legal result, it transfers the sovereignty of Spain over the Islands and their peoples to the United States and with such sovereignty necessarily the allegiance of the people, natives of Spain alone possessing the right to preserve their allegiance upon complying with the requirements of the treaty. The Porto Ricans have thus ceased to owe allegiance to Spain and now owe it to the United States. Whatever consequences follow from this fact cannot be avoided. But their allegiance or subjection having been transferred, they necessarily have become United States nationals or subjects. No other conditions are necessary to constitute American nationality.

The islanders cannot be aliens unless they owe allegiance to some other government, and even the most advanced anti-Imperialist will not contend that they are

still subject to Spain, however much he may deprecate the making of the Treaty of Paris.

The man without a country is not known to law. Having ceased to be Spanish subjects or nationals, Porto Ricans are no longer aliens and have become United States nationals or subjects.

The treaty actually accomplished a cession of the territory and a transfer of allegiance. It made the territory domestic territory (De Lima *v.* Bidwell, 182 U. S., 1.) The reservation as to political status and civil rights cannot change that cardinal fact. The country ceased to be a foreign country, yet Judge Lacombe holds the native inhabitants to be foreigners.

Aliens are merely foreigners residing or sojourning in the United States. An alien is necessarily a foreigner and must owe allegiance to another country.

> "An alien is a foreigner, a person resident in one "country but owing allegiance to another." Ency. Law, Alien.
>
> "Alien, not belonging to the same country, land "or government or the citizens or subjects thereof; "foreign; as alien subjects, enemies, property, "shores; wholly different in nature; foreign; ad- "verse." Webster's International Dictionary.
>
> "Alien, a stranger born; a person born in an- "other or foreign country as distinguished from a "native or natural born subject or citizen; in "English law, one born out of the legiance or al- "legiance of the king; in American law, one born "out of the jurisdiction of the United States. 2 "Kent's Com., 50. Alien and Foreigner are "synonomous terms. 1 Pet. R., 343." Burrill's Law Dictionary.

When the Porto Rican ceased to owe allegiance to Spain, it is difficult to see how he could still remain a foreigner. He was an inhabitant of domestic territory. Certainly he occupied a different relation to the United States from that which he had previously sustained.

He became subject to its laws and its exclusive sovereignty. These facts must have some significance.

The treaty could not take away his Spanish allegiance, transfer it to the United States and leave him unaffected.

The status of alienage or non-alienage depends upon facts. The facts accomplished by the treaty were none the less facts because the power was reserved to Congress to pass upon the status of the Islanders. Congress cannot make red men white men, even by Joint Resolution, nor can they make Porto Ricans aliens by calling them such. In order to become aliens they would have to pass under another domination. They might be transferred to Spain or ceded to some other power or given independence, but until then they *are and must remain United States nationals.*

The fact of alienage necessarily involves the idea of a power to whom allegiance is due. But no man or woman can owe the debt of allegiance without an equivalent. Who feels the advantage should also bear the burden, says the old adage; but it is equally true that he who is called to bear the burden should derive some benefit or compensation therefrom. What "commodum" or advantage does the appellant reap from her situation? To whom does she owe allegiance, outside of the United States? What nation in the wide world will raise, nay, will be permitted by us to raise a finger or even a voice in behalf of this woman if she is injured in her property and restrained in her liberty? What flag may she look to in her necessity, outside the flag of the United States? Against what Government or nation may she commit treason? And if she should commit such acts, in Porto Rico, against the sovereignty of the United States as constitute that crime, would she go unwhipped of justice because she had not been naturalized a citizen of the United States?

If it should be claimed that a Treaty alone and without an act of Congress cannot raise her out of her condition as a derelict alien, it is plain that such a claim cannot be sustained. The Treaty became from the date

of its ratification the supreme law of the land, and the language here is plain and unequivocal. Spain *cedes to the United States* the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies. This cession, accepted as it was, by the United States, necessarily transferred the sovereignty to this Government. That sovereignty plainly is, as it must be, exclusive of any foreign power.

Either Miss Gonzalez is an undefined waif, on the sea of political uncertainty, or she *belongs* to the United States, and may look to it for protection against injury, for redress where wrong has been done and for assistance where it may be needed against any Government of the earth, Spain included. The new master, viz., the United States, takes her allegiance with a burden, and having deprived her of all claim on the old master, has taken his place.

Other clauses of the Treaty make these considerations even more obvious than they might be if unaided by the terms of that instrument. To some extent, at least, the contracting parties had in contemplation the possible rights of the Spanish citizens who were transferred to a new sovereignty. There is a saving clause allowing an option to *Spanish subjects, natives of the Peninsula,* residing in the territory over which Spain by the Treaty relinquished or ceded her sovereignty. Such residents might *preserve* their allegiance to the Crown of Spain by making before a court of record a declaration of their intention to preserve such allegiance; otherwise they would be held to have renounced it and to have adopted "the *nationality* of the territory" in which they might reside.

> "Manifestly the *nationality of the inhabitants*
> "of territory acquired by conquest or cession be-
> "comes that of the government under whose domin-
> "ion they pass, subject to the right of election on
> "their part to retain their former *nationality* by re-
> "moval or otherwise, as may be provided."

Boyd *v.* Thayer, 143 U. S., at p. 162.

This clause may not directly assist Miss Gonzalez, for she is not a native of the Peninsula, and if she were, she has not availed herself of the privilege of filing the necessary declaration within the year. But is it not quite palpable that she has become vested with the same "nationality" as the Spanish native of the Peninsula who has chosen to sever his connection with Spain by failure to file the necessary declaration? It can hardly have been in the contemplation of the parties to the treaty that she and those similarly situated should be without any "nationality" whatever, while other ex-Spaniards assumed by their non-action the nationality of the territory in which they happened to reside. It seems plain that the intention was to make nationality the rule upon which the sole exception engrafted, was that in behalf of the native of the Peninsula. If he was satisfied with the "nationality" of American Porto Rico, he need only abstain from acting at all and the general rule of nationality applied to him.

III.

Allegiance determines Nationality.

(*a*) Nationality, broadly speaking, means simply membership in some political community. In the ancient world it was dependent upon descent (citizenship *jure sanguinis*) the State being based on the class, *i. e.*, tribal law. The descendant of a citizen was always a citizen wherever born, and the descendant of a foreigner always a foreigner, unless actually naturalized by positive legislation. At Rome the rule was "once a peregrine always a peregrine." The *Jus Sanguinis* thus inherited from the Roman law became the law in Europe, but for obvious historic reasons never took root in England. In that country the rule of *Jus Soli, i. e.*, subjection or citizenship because of birth within the King's

allegiance and dominion, was the law from the time of the Norman Conquest. As Prof. Pollock says:

> "A foreigner at the head of an army recruited "from many lands conquered England, became "King of the English and endowed his followers "with English lands. For a long time after this "there could be little law against aliens, there "could hardly be such a thing as English national- "ity" (History of the English Law, vol. I, p. 443).

Thus it came about that by the English law:

> "As regards the definition of the two great "classes of men which have to be distinguished "from each other, the main rule is very simple. "The place of birth is all important. A child born "within any territory that is subject to the King "of England is a natural-born subject of the King "of England" (*Id.*, p. 441).

Coupled with this rule, which has continued in England to be the law down to the present, was the doctrine of indelible allegiance and consequent denial of the right of expatriation. Hence the rule "once a subject always a subject"—but this doctrine was modified so that the right to change one's allegiance was finally recognized by allowing British subjects to expatriate themselves and aliens to become subjects by letters patent from the Crown or by Act of parliament, *i. e.*, by denization or naturalization.

Thus the sole requisite necessary to constitute a British subject is allegiance or subjection. This subjection, whether due to birth within the King's dominion or to a transfer of allegiance from a foreign sovereignty to English sovereignty, is the one essential requisite for determining the nationality of the individual. Either he owes allegiance to the sovereign or he does not. In the one case he is a subject, in the other he is an alien.

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It is quite evident that these two categories include all men and leave no middle class.

Whatever number of classifications may exist as to subjects and what rights, civil or political, belong to each class or how diverse may be the privileges accorded by law or treaty to aliens of one nation or another, the English rule leaves no room for quibble as to who are aliens and who are subjects.

It is quite clear that by the common law a change of sovereignty from a foreign domination makes the inhabitants, both *ante nati* and *post nati,* British subjects.

> "Naturalization by conquest was the conse-
> "quence of that change in the law of war by which
> "the conqueror instead of gaining captives and
> "slaves and property, obtained dominion and
> "subjects. This was the law soon after the arrival
> "of the Normans in England, and was certainly
> "understood to be so as early as the reign of Henry
> "II, when the people of Ireland became his sub-
> "jects from the conquest of the island. Lord
> "Coke mentions in his report of Calvin's case,
> "among the ways by which the denization of an
> "alien may be effected—that of conquest.
>
> "'As if the King and his subjects should con-
> "'quer another kingdom or dominion, *as well ante*
> "'*nati as post nati,* as well they which fought in
> "'the field, as they which remained at home for the
> "'defense of their country, or employed elsewhere,
> "'are all denizens of the Kingdom or dominion
> "'conquered.'" Coke Reports, Part VII, folio 6
> * * * "by such operation of law it is not too
> "much to assert, said Chalmers in 1814, that there
> "had been acquired to the British Empire since
> "the commencement of the present reign forty
> "millions of subjects." (Chalmers' Colonial Opin-
> ions, 663) Lawrence's Wheaton. Appendix, p.
> 894.

The English rule on the subject is admirably ex-

pounded by Lord Mansfield in *Campbell* v. *Hall*, 1 Cowper's Report, 204 (1774). This was an action against the collector of customs of the Island of Grenada to recover certain duties there levied in accordance with a Royal decree. The case thus involved the question as to the power of the Crown over captured territory, Grenada having been captured from the French and Parliament having taken no action in regard thereto.

> "The special verdict then states some articles "of the capitulation. * * * It next states "the 6th Article where to a demand of the inhab- "itants of Grenada, requiring that they should be "maintained in their property and effects, etc., the "answer is the inhabitants *being subjects* of Great "*Britain*, will enjoy their properties and priv- "ileges in like manner as the other, his majesty's "subjects, in the other British Leeward Islands; "so that the answer is that *they will have the con- "sequences of their being subjects*, and that they "will be as much subjects as any of the other Lee- "ward Islands."

Lord Mansfield then states general propositions governing such a case.

> "A country conquered by the British Arms be- "comes a dominion of the King in the right of "his crown; and therefore, necessarily subject "to the legislature, the Parliament of Great Brit- "ain."
>
> "The 2nd is, *That the conquered inhabitants "once received under the Kings protection, be- "came subjects, and are to be universally con- "sidered in that light, not as enemies or aliens.*"

The converse of this proposition is equally true. It is so stated by the eminent English commentator on International Law, Westlake.

"The cession of a British territory, or the "acknowledgment of its independence, causes the "loss of their British nationality by all persons "domiciled within it at the date of the cession." Int. Private Law, 203.

Doe *v.* Acklam, 2 B. & C., 779, held that all British subjects in America became aliens on the signing of the treaty recognizing American independence.

In the case of the Stepney Election Petition, 1886, 17 Q. B. D., 54, it was held that Hanoverians, born before the accession of Victoria, were British subjects, *not aliens,* but by the separation of the Crown they became aliens and could not vote in England. Lord Coleridge there said:

"It has long been settled that while the crowns "of the countries, are held by the same persons "the inhabitants of the two countries are not aliens "in the two countries respectively. * * * "

"The Hanoverian by birth who had needed no "naturalization in the life time of William IV "needed it when the Hanoverian heir and the suc-"cessor of that monarch was no longer the sov-"ereign of these islands. * * * He became "an alien because the sovereign to whom his allegi-"ance was due became a foreign sovereign; "* * * The crowns had by accident, been "united in one person, but when the union of the "crowns came to an end the union of allegiance "ceased too."

Thus the English law both ancient and modern is quite plain. Had Spain ceded Porto Rico to England in the same manner as she did to the United States, no possible doubt could have existed that the native inhabitants were British subjects. No question could have arisen here had it not been for the ambiguous meaning of the term citizen in American law.

The United States Government did not claim until this case arose that the islanders were aliens. The Attorney-General in the Insular cases took the position that they were subjects.

> "To be called an American subject is no dis-
> "grace. The term does not imply anything as to
> "the nature or form of the Government of which
> "one is a subject. It imports only that a person is
> "within the protection and allegiance,—either
> "permanent or temporary—of a particular sover-
> "eignty; it may be imperial or it may be republi-
> "can. *It does not signify in any degree the grade*
> *"or status of citizenship occupied by the person*
> *"within the domestic economy of his sovereign."*
>
> *"The Insular Cases."* Brief of Atty-Gen., 172.

(*b*) The question as to the meaning of the term citizen and what constitutes citizenship under the United States Constitution and laws, must be examined in the light of the English law.

U. S. v. *Wong Kim Ark,* 169 U. S., 655.

See also

Minor v. *Happersett,* 21 Wall., 162.
Ex parte Wilson, 114 U. S., 417.
Boyd v. *U. S.,* 116 U. S., 616.
Smith v. *Alabama,* 124 U. S., 465.
Moore v. *U. S.,* 91 U. S., 270.

> "The interpretation of the Constitution of the
> "United States is necessarily influenced by the fact
> "that its provisions are framed in the language of
> "the English common law and are to be read in the
> "light of its history."
>
> Justice Matthews in *Smith* v. *Alabama,* 124 U. S., 478.

"British subject means any person who owes "permanent allegiance to the crown" (Dicey Con- "flict of Laws, 173-7). *"Nationality or Allegi- "ance* in substance depended * * * not upon "the locality of a man's birth, but upon his being "born within the jurisdiction and allegiance of the "King of England."

"The term 'citizen' as understood in our law is "precisely analogous to the term 'subject' in the "common law, and the change of phrase has en- "tirely resulted from the change of Government" *Wong Kim Ark.,* 169 U. S., at pp. 657-8-664.

In a very recent case this Court again said:

"The term 'citizen' in our law is precisely "analogous to the term 'subject' in the common "law and the change of phrase has entirely re- "sulted from the change of government. The "sovereignty has been transferred from one man "to the collective body of the people and a 'sub- "ject' of the king is now a 'citizen' of the State."

Hennessy *v.* Richardson, 189 U. S., at pp. 34-35.

That the terms citizen and subject are at present identical in meaning is clear from *Minor* v. *Happersett,* 21 Wall., 162.

"The very idea of a political community, such "as a nation is, implies an association of persons "for the promotion of their general welfare. Each "one of the persons associated becomes a member "of the nation formed by the association. *"He owes it allegiance and is entitled to its "protection.* Allegiance and protection are, in "this connection, reciprocal obligations. The one "is a compensation for the other; allegiance for "protection and protection for allegiance.

"For convenience it has been found necessary to "give a name to this membership. The object is to

" designate by a title the person and the relation he
" bears to the nation. For this purpose the words
" 'subject,' 'inhabitant' and 'citizen' have been
" used and the choice between them is sometimes
" made to depend upon the form of the govern-
" ment. Citizen is now more commonly employed,
" however, and as it has been considered better
" suited to the description of one living under a re-
" publican government, it was adopted by nearly
" all the States upon their separation from Great
" Britain, and was afterward adopted in the Arti-
" cles of Confederation and in the Constitution of
" the United States. *When used in this sense it*
" *is understood as conveying the idea of member-*
" *ship of a nation and nothing more*" (pp. 165-6).

As has been tersely said by an eminent publicist:

" The law knows nations only as political com-
" munities, as sovereign and independent States.
" *Nationality,* therefore, as a legal attribute of per-
" sons, is connection with a certain body politic,
" membership in a particular State. The members
" of a State are called its subjects or citizens. The
" former term, if properly construed, is applicable
" to the people of any nation without regard to the
" form of government, for every State is based
" upon the relation of its members to its sover-
" eign. But the word subject has become historic-
" ally associated with the theories of feudal and
" absolute monarchy, and has thus fallen into dis-
" favor."

(Encyclopædia Political Science and United States History, article Nationality, by Munroe Smith.)

Mr. Butler in his recent work says that the word nationality is used to " distinguish the people of " the United States as a people rather than as a " race; the people of the United States forming as

"they do, a nation, are necessarily composed of "many races—Christian and Mohammedan— "Anglo-Saxon, Teutonic and Latin—Jew and "Gentile—all of these, as well as other racial ele- "ments, unite in forming one people as a nation; "in this sense therefore 'nationality' signifies as to "the people, the element of homogeneity by which "all these people are united, regardless of internal "and sectional differences, into a great nation, "owing allegiance to a common government as "against all of the other governments of the "world."

Butler, Treaty Making Power, p. 16*n.*, vol. I.

Summing up on this point it seems perfectly clear that the transfer of the allegiance of the native inhabitants made them subject to the jurisdiction of the United States; they were no longer foreigners, or aliens, but became subjects or nationals. This is enough for the purpose of the case, but the matter is of such importance that the question may perhaps be elucidated by inquiring whether, if having ceased to be aliens, they have become citizens or whether they form a class of nationals who are not also citizens.

III.

The change of allegiance, while it made the Porto Rican born before the cession a national or subject, did not necessarily make him a citizen.

The steps by which the Circuit Judge reached his conclusion that the petitioner was an alien are as follows:

I.—The inhabitants of Porto Rico were aliens prior

to the ratification of the Treaty of Paris, April 11, 1899.

II.—As such alien inhabitants they could only become citizens of the United States by naturalization.

III.—The petitioner having been born before the treaty, must show that she has been naturalized. She could invoke no law save the treaty of annexation. But conceding the possibility of collective naturalization by treaty, the Treaty of Paris expressly reserved the "civil rights and political status of the native inhabitants" to the future action of Congress.

IV.—Congress not having legislated as to the naturalization of Porto Ricans, they have not become citizens; *therefore, their original status remains unaffected and they are aliens.* Or to use the learned Judge's exact language:

> " Being foreign born and not naturalized, she re-
> " mained an alien and subject to the provisions of
> " law regulating the admission of aliens who come
> " to the United States" (Record, p. 16).

Thus, according to this decision, there is no middle ground between citizens and aliens, and any one who is not an American citizen is necessarily an alien.

"An American alien" certainly would seem, at least to one unaccustomed to some of the startling paradoxes of the law, a strange and monstrous category. Is it a logical result? We think not, and for the following reasons:

It is true that the ninth clause of the Treaty provides that the civil rights and political status of the native inhabitants of the territories ceded to the United States shall be determined by Congress. But this determination belonged to Congress in any event. It may plausibly be contended that the natives of Porto Rico did not

become "citizens" by virtue of the Treaty, for the Treaty does not in terms make, or profess to make, them such. It would be enough for our purpose that it "nationalizes" them, which may be quite different in its effect from "naturalizing" them.

If there is no difference between a national and an alien it was quite proper to exclude Miss Gonzalez from our country, because she had not gone through the forms of naturalization and renounced her allegiance to some foreign power which she would have found it difficult to name. If she had named Spain, which had rejected and repudiated her, an element of humor might be injected into the case, but would not relieve it of its difficulties.

"The political status and civil rights" having been reserved for the future action of Congress, it is possible to argue that no naturalization has taken place; it has, however, already been shown that the Porto Ricans were nationalized, that is to say, their allegiance transferred, but as nationalization does not necessarily mean naturalization, it may well be that they occupy an intermediate status between citizens of the United States and aliens. In other words, they are certainly entitled to the protection of the government, and, as far as foreign nations are concerned, are Americans, yet they may not be vested with all the rights of citizens of the United States.

What these rights of citizens of the United States are, it is very difficult to determine. The trend of doctrine in the Supreme Court of the United States seems to be that most of the rights of citizenship are under the protection of the States themselves, that civil liberty was not nationalized by the Fourteenth Amendment, and that only such rights as are expressly secured by the Constitution of the United States belong to the citizen; that for the vindication of all others he must look to the State. Thus the citizen of the United States who is not also a State citizen, but an inhabitant of a Territory, holds his rights subject to the discretion of Congress,

except in so far as that body may be limited by the express mandates of the Constitution. *Civil Rights cases, 109 U. S., 3.*

In the recent case of *Maxwell* v. *Dow,* 176 U. S., 581 at pp. 588-9, the Court quotes, with approval, the language of Mr. Justice Miller in the *Slaughter House cases,* referring to Section 2 of the Fourth Article of the Constitution, wherein it is provided that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. The Court says:

> "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; * * * The enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

It is thus apparent that the rights of citizens of the United States are almost impossible of definition. The general right to life, liberty and property, provided for by the Constitution and more specifically by the ten Amendments in favor of civil liberty, applies to all men alike, whether citizens or aliens. *Wong Wing* v. *U. S.,* 163 U. S., 228. See also Woodrow Wilson, The State, p. 498, §917.

The only positive right conferred by the Constitution

upon a citizen as such seems to be the right to sue in a Federal Court. This was the right which it was held that Dred Scott did not possess because not a citizen. Thus, as far as the Government of the United States is concerned, the inhabitants of the Islands, assuming them to be nationals, but not citizens, could hardly be said to have any lesser civil rights in fact than full citizens of the United States. While they could not sue in Federal Courts, this would scarcely be an additional burden to those that remained at home, because this right only belongs to a citizen of the United States residing in a State. It is not possessed by the residents of the District of Columbia, nor of the Territories of the United States.

As far as the action of the States themselves is concerned, the matter becomes somewhat more complicated. One of the most natural illustrations is as to the holding of real estate in the various States. In many of our States there exists as an obsolete remnant of the old and barbarous *Droit-d' aubaine,* the law by which an alien holder of real estate is subject to an action of forfeiture. This rule, according to the learned Mr. Pollock, arose historically from the habit of the English Crown of confiscating the estates of Norman nobles, situated in England, who swore allegiance to the Crown of France after the separation of Normandy from England. This practice ripened with time into a general rule of law. Its illustrious origin has long been forgotten, and it now remains as a remnant of ancient, time-honored law. History of the English Law, Vol. I, 441-50.

It is to be noted, however, that the right to hold real estate free from any interference on the part of the Government is not a right inherent in the citizen as such, but that the prohibition is simply a disability of alienage. Thus, if our theory be correct, a Porto Rican might well hold real estate in the City of New York, free from molestation by the Attorney-General, because, even if not considered a citizen, he certainly is not an alien, and, therefore, not under the consequent disabilities.

It is thus apparent that there are very few, if any, civil rights which in such a view he would not have in common with citizens.

As to political rights, however, the situation is entirely different. Usually, though not always, the right to vote in the various States is conditioned upon citizenship of the United States, and, if our theory be correct, statutes to this effect might not apply to a Porto Rican national, and thus in the absence of State legislation, especially made to fit his case, he would not be allowed to vote in the States. As some of the States, however, allow aliens to vote, after a declaration of intention to become citizens, this disability could and would easily, if the State desired it, be removed for the benefit of those of our new inhabitants who desired to settle in the States.

As a writer on International Law recently put it (Mr. Randolph, in his excellent article on "The Insular Cases"), "There is nothing in the Constitution of the United States to prevent a State from inviting an immigrant to go from the wharf to the polls and vote for presidential electors." Columbia Law Review.

It is thus manifest that the distinction here made between aliens and nationals is very important for the Islanders themselves, and if held sound by the Supreme Court of the United States, they will not be under the disability of alienage and will enjoy nearly, if not quite, all the ordinary civil rights pertaining to the citizen.

On the other hand, the distinction between the two classes of nationals, namely, citizens of the United States, that is to say, those born or naturalized within the United States, and those not born or naturalized therein, but owing allegiance thereto, is important. If Porto Ricans are not citizens of the United States, all the political privileges accorded by law to citizens as such would not apply to them, and thus in the absence of special legislation they would have no political rights in the various States until the States chose to change their legislation. In so far as the Islanders remaining at home are concerned, they would,

in any event, be subject to the complete control of Congress in the matter of political rights, the Constitution placing no limitation upon Congress, acting in and for the Territories, in that respect. In this regard they would be under no greater political disability than inhabitants of the District of Columbia.

It seems to us that this conclusion harmonizes with the general theory of the Treaty makers and the general policy of the government, which is to confer the ordinary civil rights upon the new inhabitants, while withholding from them all political privileges.

It may be asked whether they have the right to trial by jury and to the other civil rights guaranteed by the Constitution. It is sufficient to say that these rights are in no wise dependent, either upon citizenship or alienage. They are accorded to all persons.

It is quite possible, however, that the Supreme Court might decide that some of these limitations were only operative upon Congress when acting within the United States proper, and that, therefore, they did not apply to the new inhabitants. (Territory of Hawaii *v.* Osaki Mankichi, 190 U. S.) It is thus seen that this question is entirely beside that of citizenship or alienage and has only to do with the applicability of certain portions of the Constitution when limiting the power of Congress in legislating for the new territory.

This theory, while according to our new nationals certain rights, and conferring upon them a country, does not in any way interfere with the policies of the people of the United States by giving to the new peoples any political power, and hence any voice as to our government or institutions. They are alike cut off, in both cases, from any injurious interference in the destinies of the nation.

It is evident that there may be various gradations or subdivisions of subjection. Subjects may possess varying degrees of civil or political rights as is well said by one of the latest writers upon the subject.

"Generally the term citizen is used in regard to

"the 'national' invested with all civil and political "rights. We must not, however, confuse, as is too "often done, these two terms. *Every national in-* "*deed is not a citizen, although every citizen is a* "*national.* In France, for instance, minors, mar- "ried women and incompetents are not citizens, "but they nevertheless possess French nationality; "they are deprived of political rights and only "possess the enjoyment of civil rights. The Alge- "rians have not even the enjoyment of civil rights; "they are governed by the Mussulman law in their "relation between themselves, and yet they have "been solemnly declared Frenchmen by the *sena-* "*tus consultum* of 1865, and the decisions of the "Court had upon several occasions theretofore "recognized that they possessed this quality "(French nationality)." (Cogordan, La Nation- alité, pp. 7-8.)

The great publicist Bluntschli following the same line of thought, says:

"The body of full citizens rise above the general "mass of the members of a country or nation. "Full citizenship implies membership in the na- "tion, but more than that, it implies complete po- "litical rights; it is thus the fullest expression of "the relation of the individual to the State." (Theory of the State, English translation, p. 203.)

The framers of the Constitution probably supposed that in the United States, nationality and subjection were identical, that is to say, that all persons within the permanent allegiance of the United States were citizens just as such persons had been subjects of Great Britain before the Revolution. This view seems to have been practically undisturbed in the United States until the famous case of *Dred Scott* v. *Sanford,* 19 How., 399, which held that subjection and citizenship were not

necessarily identical and that there existed a class of persons in the United States who, although not aliens, were nevertheless not citizens. We refer to the status of the free Negro before the enactment of the XIVth Amendment.

> "The words (in the Constitution) 'people of the "United States' and 'citizens' are synonymous "terms, and mean the same thing. They both de- "scribe the political body who, according to our "republican institutions, form the sovereignty, and "who hold the power and conduct the Government "through their representatives. * * * Con- "gress might, as we have before said, have author- "ized the naturalization of Indians, because "they were aliens and foreigners. * * * The "African race, however, born in the country, did "owe allegiance to the Government, whether they "were slave or free; but it is repudiated and re- "jected from the duties and obligations of citizen- "ship in marked language" (pp. 404-5).

The question involved in the Dred Scott case was whether a free negro could sue as a citizen in the federal courts, and the decision was based upon the fact that he could not have been a member of the political people. It was the impossibility that he should have been invested with political rights that led the Court to declare him a mere subject.

The status of the colored race was, until the enactment of the XIVth Amendment changed their status, settled by this decision.

Mr. Chief Justice Fuller in his dissenting opinion in the case of *United States* v. *Wong Kim Ark*, 169 U. S., 649, says:

> "Nor would a naturalization law excepting per- "sons of a certain race and their children be in- "valid, unless the amendment has abridged the "power of naturalization. This cannot apply to

"*our colored fellow-citizens, who never were* "*aliens.*" (p. 729).

It was for the purpose of removing from our jurisprudence this class of persons who owed the United States allegiance and yet were not citizens that the XIVth Amendment defined citizenship. This definition made citizenship and subjection at the common law identical, as Mr. Chief Justice Fuller said, in the Wong Kim Ark Case (p. 727) referring to the fact that the 14th Amendment was intended to apply to the colored race:

> "They were not aliens (and even if they could "be so regarded, this operated as a collective nat- "uralization) and their political status could not "be affected by any change of the laws for the "naturalization of individuals."

As this Court said in *Elk* v. *Wilkins,* 112 U. S., 101:

> "The main object of the opening sentence of the "XIVth Amendment was to settle the question, "upon which there had been a difference of opinion "throughout the country and in this Court, as to "the citizenship of free negroes (Scott *v.* Sandford, "19 How., 393); and to put it beyond doubt that "all persons, white or black, and whether formerly "slaves or not, born or naturalized in the United "States, and owing no *allegiance to any alien* "*power,* should be citizens of the United States "and of the State in which they reside."

The only other instance in the history of the United States in which subjection and citizenship have not been identical is that of the status of the Indian living apart from his tribe and who has assumed the habits of civilization.

In the case of *Elk* v. *Wilkins, supra,* it was held that an Indian, born a member of one of the tribes, who was voluntarily separated from his tribe and had taken

up his residence among the white citizens of a State is not a citizen of the United States within the meaning of the XIVth Amendment.

The theory as to the legal status of Indians has always been, since the case of the Cherokee Nation *v.* Georgia, 5 Peters, 1, that the Indian member of a tribe owed immediate allegiance to his tribe, which was in turn under a general protectorate of the United States, and hence did not come either within the definition of subjection at the common law, or within the purview of the XIVth Amendment. Consequently it was necessary to consider him as an alien, a member of a tribe which the United States recognized at least as *quasi* independent by making treaties with it.

> "The Indian tribes, being within the territorial "limits of the United States, were not, strictly "speaking, foreign States; but they were alien "nations, distinct political communities, with "whom the United States might and habitually "did deal, as they thought fit, either through "treaties made by the President and Senate, or "through acts of Congress in the ordinary forms "of legislation. The members of those tribes "owed immediate allegiance to their several tribes, "and were not part of the people of the United "States" (*Elk* v. *Wilkins,* 112 U. S., p. 99).

On this theory, therefore, Elk was held not to be a citizen of the United States; having, however, renounced his allegiance to his tribe, it would seem that he had become at least a subject of the United States, and this was the view expressed by Mr. Justice Harlan in his dissenting opinion.

> "If he (Elk) did not acquire national citizen- "ship on abandoning his tribe and becoming, by "residence in one of the States, subject to the com- "plete jurisdiction of the United States, then the "Fourteenth Amendment has wholly failed to ac-

> "complish, in respect of the Indian race, what, we "think, was intended by it; and there is still in "this country a despised and rejected class of per- "sons, with no nationality whatever, who, born in "our territory, *owing no allegiance to any foreign "power,* and subject, as residents of the States, "to all the burdens of government, are yet not "members of any political community nor entitled "to any of the rights, privileges, or immunities of "citizens of the United States" (*Elk* v. *Wilkins*, 112 U. S., p. 122).

Evidently Congress considered that an end should be put to so anomalous a situation and soon enacted that Indians who had separated themselves from their tribes and taken up civilized life should be considered citizens of the United States. (24 Statutes at Large (1887), chap. 119, sec. 6, p. 388, at p. 390.)

We have instanced the case of the free negro and of the Indian separated from his tribe, as the only illustration within our history in which it was possible to consider that we had a class of persons who, while owing allegiance to no foreign government, were not citizens, but merely subjects of the United States.

This is doubtless due to the fact that in our history we have been so little brought into contact with races inferior to us in development and civilization. Our former growth has been rather by expansion and assimilation than through the method of imperialism, *i. e.*, the domination over men of one order or kind of civilization, by men of a different and higher civilization. The negro problem was set at rest by the war and the Fourteenth Amendment; the Indian problem by the ruthless progress of civilization, which compelled the opening up and exploiting of the American continent by the overflowing population of old Europe. In the contact, the Indian gradually perished and the problem was reduced to very minor proportions through the agencies of fire water, gunpowder and well-intended but unwise policy.

The logic of events is often more powerful than that of Aristotle.

IV.

Illustrations of distinction between subjects and citizens.

Other civilized nations have, however, been brought in contact with uncivilized or semi-civilized tribes or people who become wholly subject to their jurisdiction, and whose legal status it consequently was necessary to solve.

We have seen that the English law has always treated such persons from the moment of the severance of their allegiance from their former masters as British subjects.

This natural and necessary consequence is also admirably illustrated by one of the most recent territorial acquisitions of France,—that of Algeria.

> "The conquest of a country like Algeria gives "rise to questions which cannot be governed by the "application of the ordinary rules of law followed "in Europe. In practice it has been admitted "that the Algerians were *French subjects,* not citi- "zens (it must be remembered) from the moment "that their country was definitely annexed to "France. Hence the tribunal of Paris did not "hesitate to declare, even before the treaty of "Tafma, of 20th of March, 1837, that the Alge- "rians were like other Frenchmen, dispensed from "the necessity of furnishing security for costs," Cogordan, La Nationalité.

The question was thus very similar to that involved in this case, as in neither case had the executive or the legislative authorities conferred any rights of citizenship

upon the annexed people, but their allegiance had been transferred from their former sovereign to the new one. The Court of Cassation declared that although there was no legislation fixing their status, and it had not been established by any treaty, nevertheless the Ordinance of the 10th of August, 1834, had submitted the Algerians to French law and sovereignty, and from that time it was no longer possible to treat them as aliens.

> "In declaring in its Art. 109 the union of "Algeria and the Colonies to the French Republic, "the Constitution of November, 1848, did not ef- "fect anything as to the nationality of the inhabi- "tants; since we find the counsel for the order of "lawyers of Algeria contesting the claim of a "native to be a Frenchman and hence the "possibility of his admission to the bar; "this case coming before the Court of Cassa- "tion it was held that by the very fact of the "conquest of Algeria the Israelite natives became "French subjects. Placed, indeed, under the "direct and immediate sovereignty of France, they "are unable in any event to claim the benefit or "aid of any other nationality, *from which it fol- "lows necessarily that the quality of Frenchmen "can alone thereafter be the basis and rule of their "civil and political condition.*" Glard, Nationalité Francaise, p. 380.

In matters of private law the Mohammedan subjects were left under their own rules and customs.

The French Government thus recognized a situation which we, until very recent years, refused to recognize in the case of the Indians, namely, that such tribes or peoples living under a different law and civilization, possessing a complete organization of their own, should be treated as nationals of the sovereignty to which they were really subject, but should be in their private relations governed by their tribal law. While we did not interfere with the tribal

law of the Indians, we yet affected to assimilate them rather to a foreign people than to nationals, and made treaties with them, in preference to legislating for them directly. Our legal theory was thus at variance with the actual facts.

The Algerian subject is accorded no political rights whatever and can possess none except by becoming a French citizen. This the Algerian may become either by legislation, for example, the Décret Crémieux, October, 1870, conferred French citizenship on the Israelite inhabitants of Algeria, or by naturalization, but this naturalization is somewhat different from the naturalization of an alien. The Algerian has only to make a simple declaration before the mayor, and after examination as to morality, etc., by the mayor and upon the recommendation of the Council of State, the naturalization is granted as matter of right.

Already French, the native Mohammedan is subject after his naturalization to all the French civil and political laws; he pays the French and not the Arab taxes. He becomes immediately an elector, and eligible to Parliament, etc.

Glard, Nationalité Francaise, 263.

An analogous question was presented when France annexed Cochin China. The native Anamite inhabitant is declared by law (Decree 25th, 1881) French, but he remains subject to his own local laws and customs except in special cases in which by complying with certain formalities he may be placed under the jurisdiction of the French law, just as in Algeria he may acquire the civil rights of a citizen by showing that he has reached the age of twenty-one and is able to speak the French language, etc. (Cogordan, La Nationalité, p. 139).

By the cession of Taïti to France in lieu of the former protectorate, the whole native population became French subjects. The law (31 Dec., 1880), declared that "French nationality has been acquired (*de plein droit*) by all the former subjects of the King of Taïti."

"Such a disposition is self-explanatory; the "sole manner of escaping the result is emigration "or the acquisition of a foreign nationality; they "are no longer subjects of the king of Taïti" (Glard Nationalité Française, p. 408).

See also other illustrations mentioned in Argument for Plaintiffs in Error De Lima *v.* Bidwell, 76-78.

We have thus seen that subjection is dependent upon allegiance, but that the civil and political rights of subjects may vary from those of the subjects who have full political rights (active citizens) to those who have limited civil rights (mere subjects). In our law and that of civilized States generally, except in cases of dependencies inhabited by semi or uncivilized people there are but two classes of subjects or citizens, namely, active citizens, that is to say those possessing political rights (burghers), and passive citizens, that is to say, those possessing full civil but no political rights, such as minors, women and incompetents. It is only, as the historic illustrations cited have shown, when civilized nations come into contact with people of a lower order of civilization that there is any disposition to refuse to subjects the ordinary civil rights. In Europe and America even aliens possess almost, if not quite all of the civil rights belonging to citizens, such as the right to possess property, to have recourse to the courts, etc.

It is for this reason that it has been difficult to apprehend that nationalization did not necessarily comport naturalization and that persons might cease to be foreigners or aliens without becoming citizens. We have seen that under our law the civil rights of citizenship in a broad sense, which would not also be possessed by any subjects or nationals of the United States, would be very few—the right to sue in the Federal Courts would be almost the only one belonging to passive citizens as distinguished from mere subjects. The fact that a national

was deprived of these rights would not convert him into an alien and he would not be governed by the laws relating to alienage.

V.

Conclusion.

There are three possible courses which this Court may adopt:

1. It may affirm the decision below and declare native islanders, born before the cession, aliens.

2. It may hold that the cession by transferring the allegiance of the natives made them United States subjects or nationals and that as such they are not under the statutory disabilities of alienage and cannot be deported under the Immigration law.

3. The Court may take the view that the cession of the Islands accomplished the naturalization of the native people and that they became passive citizens of the United States entitled to all civil rights of such.

See argument of undersigned counsel, De-Lima *v.* Bidwell, 182 U. S., p. 3.

It seems to us quite obvious that the choice will be between the last two. It would be impossible to affirm the judgment of the Court below without leading to an absurd and unnecessary result. Plain terms would cease to have any meaning and we would consider aliens persons who owed us their sole allegiance and to whom we owed our protection. Such a result is too palpably defiant of the laws of thought and language, is altogether anomalous and we must respectfully submit is clearly impossible.

The Court might, however, adopting the suggestion of the Circuit Judge that the treaty expressly refrained from naturalizing the native population, hold that they were not citizens, and as such not possessed of any civil rights, but that they had become American nationals or subjects and were therefore, not within the purview of statutes aimed at aliens.

This result could be supported by the precedent of the free Negro and the detached Indian,

> *Dred Scott* v. *Sanford,* and *Elk* v. *Wilkins, infra,*

and was the view taken by the Attorney-General of the United States at the time of the argument of the Insular Cases. While it has some logical force and may be supported by the two precedents referred to as well as by the precedents adduced from the history of foreign nations, such as that of Algeria, it seems to us nevertheless to be a narrow view.

The third view would seem to be more compatible with sound political science, as well as more in accord with the spirit of our Constitution, and the jurisprudence of this Court. While it may be said that the treaty reserved to Congress the right to pass upon the civil rights of the native inhabitants, the treaty could not change facts. It had accomplished the cession and the results naturally and necessarily following from cession cannot be avoided.

It could not have made the country a foreign country by stating that it should remain foreign although ceded to the United States and subject to its plenary jurisdiction.

Even the treaty-making power and Congress together cannot change facts by violating the laws of language.

It therefore seems to us that the cession of the territory, its becoming domestic territory (DeLima *v.* Bidwell), with the transfer of the allegiance of its inhabitants, naturalized the natives in the sense that they became passive citizens of the United States, enti-

tled to all the rights, privileges and immunities of such. Boyd *v.* Thayer, 143 U. S., 162.

Unless we adopt this course we are forced to have recourse to the two precedents in our history of which we are least proud, and to introduce for the third time into our system a class of persons whom it has always been our object to be free from. The XIVth Amendment, annulling the result of the Dred Scott Case, the Act of Congress doing away with the result reached in Elk *v.* Wilkins, would go for naught, and we would again be confronted by a situation in which citizenship and subjection were not identical.

The two precedents above adverted to give us no encouragement to attempt for the third time a repetition of that peculiar, and, from a standard of American civilization, most anomalous result.

All of which is respectfully submitted.

Dated, New York, November 30, 1903.

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Counsel.

20853

United States Supreme Court.

OCTOBER TERM, 1903.

No. 225.

ISABELLA GONZALEZ,
Petitioner,

AGAINST

WILLIAM WILLIAMS, United States Commissioner of Immigration at the Port of New York.

Reply Brief for Petitioner.

Finality of Immigration Commissioner's Decision.

The Chinese Cases:

Chin Bak Kan *v.* U. S., 186 U. S., 193.
U. S. *v.* Lee Yen Tai, 185 U. S., 213.
Fok Yung Yo *v.* U. S., 185 U. S., 296.
Lem Moon Sing *v.* U. S., 158 U. S., 536.

The Chinese cases do not establish that the decision of the Immigration Commissioner on the subject of *alienage* is conclusive.

(1) The Chinese Exclusion Act differs from the Immigration law in general.

The Act of May 6th, 1882 (22 Stat., 58), provides that

> "no Chinese person shall be permitted to enter the United States, etc., and any Chinese person found

> unlawfully within the United States shall be caused to be removed therefrom to the country whence he comes, by direction of the President of the United States and at the cost of the United States, after being brought before some justice, judge or commissioner of the court of the United States and found to be one not lawfully entitled to be or remain in the United States."

The same provision was continued in the amended Act of July 5th, 1884 (23 Stat., 115).

The Act of May 5th, 1892 (27 Stat., 25), continued in force all laws prohibiting or regulating the entry of Chinese.

Section 3 of this latter Act of 1892, put the burden upon "any Chinese person of Chinese descent arrested under the provisions of this Act or the Acts hereby extended" to "establish by affirmative proof before a justice, judge or commissioner his lawful right to remain in the United States."

An Act of September 13th, 1888, contains similar provisions, most of which were dependent upon the ratification of the treaty of March 12, 1888, which was not ratified. Some of the provisions of the Act of 1888 have, however, been considered as in force, and one of such provisions gives to any Chinese "convicted before a Commissioner of the United States Court" a right to appeal to the judge of the district court. It was under this latter provision that the case of Chin Bak Kan *v.* United States was taken to the Supreme Court and the jurisdiction of the Commissioner to determine the "various facts on which citizenship depends," was upheld. This jurisdiction of the Commissioner was judicial. The hearing was a judicial hearing, and the decision of the Commissioner was a judgment from which appeal was allowed to a judge of the district court.

This is quite different from leaving the status of a person to be determined by an administrative officer. The case of *U. S.* v. *Lee Yen Tai*, presented the case of

a petitioner who alleged himself to be a merchant and not a laborer, and the main question determined in that case was that the treaty of 1894, had not abrogated the several acts regulating Chinese immigration.

Article 5 of such treaty provided that "the Chinese Government would not object to the enforcement of the Act of 1892." In the case of *Fok Yung Yo* v. *U. S.*, a Chinaman arrived at San Francisco and claimed to be in transit for Guatemala. The Collector of Customs denied him the privilege of further pursuing his journey through the United States and he was ordered deported. No question was raised in this case as to the alienage or nationality of the petitioner and his alienage being admitted, the decision of the proper executive officer as to the Chinaman's good faith with reference to his supposed transit, was held to be final.

This case followed that of *Lem Moon Sing* v. *U. S.*, in which Mr. Justice Harlan speaking for the court, said, with reference to the contention that the administrative officer's decision could not be final.

> "That view, if sustained, would bring into the courts *every case of an alien* who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the Executive Branch of the Government."

This will defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular *alien* seeking admission into this country belongs to the class entitled by some law or treaty to come into the country or to a class forbidden to enter the United States.

This decision, we submit presupposes the alienage and sustains the finality of the Executive Officer's decision upon whether such "alien" could be admitted.

This is the view taken by the United States District Court, Wheeler, *J.*, in April, 1899, in *U. S.* v. *Yee Mun*

Sang, in which the court held that the finality of the Executive decision was only with reference to the causes for which an alien, an admitted or proved alien, might be excluded, but that the law did not commit to an administrative officer the determination of the status of the person seeking admission. The court says:

> "But citizenship of the country is a status of the person, that is attendant at all times everywhere and cannot be taken away, or but in a formal way, as provided by law, be renounced even by act of the person. If the appellant was in fact a citizen of the United States, he would not lose his citizenship by presenting himself as an alien merchant to the customs officials for admission to this country as such." * * *

"The validity of this provision (28 Stat., 390), rests upon the power of Congress to exclude aliens from the United States and to commit the decision of their right to come or to remain to Executive officers." *Nishimura Ekin* v. *United States,* 142 U. S., 651; *Lem Moon Sing* v. *U. S.,* 158 U. S., 538.

"This is because *they are in fact aliens* and as such may be excluded and not because the power to decide whether they are aliens or citizens has been or could be committed finally by Congress to customs officials or other executive officers. In this case the officers did not assume to decide that the appellant was an alien, but assumed that he was such and to decide that he was not so made to appear to be a *merchant* as to entitle him to admission to this country as an alien Chinese merchant and excluded him from admission as such." (93 Fed. Rep., 365-66.)

(2) It is at the least very doubtful if the provision in the Act of August 18th, 1894 (28 Stat., 390), is applicable to any but the Chinese Exclusion Act.

The Act of August 18th, 1894, is the "Sundry Civil Expenses Appropriation Act." At page 390, 28 Stat.,

is a provision under the sub-heading "Enforcement of the Chinese Exclusion Act" appropriating the sum of $50,000 for enforcing the provisions of the Act of May 5th, 1892, followed by this paragraph:

> "In every case where an alien is excluded from "admission into the United States under any law "or treaty now existing or hereafter made, the de- "cision of the appropriate immigration or customs "officers, if adverse to the admission of such alien, "shall be final, unless reversed on appeal to the Sec- "retary of the Treasury."

This closes the sub-heading: "The Enforcement of the Chinese Exclusion Act." Then follows another sub-heading, "Bureau of Immigration," which has a number of provisions for increasing head money, appointment of commissioners, payment of inspectors, and the requirement of a report from the Secretary of the Treasury of some plan for the organization of the immigration service.

Whether under these circumstances it can be held that this paragraph and a sub-heading relating to the Chinese Exclusion Act can be held to apply to anything more than the enforcement of that Act, is worthy of consideration.

In this relation, the enacting clause of the Immigration Law, March 3, 1891 (26 Stat., p. 108), is significant. It is as follows:

> "Be it enacted, etc., that the following classes of "aliens shall be excluded from admission into the "United States, in accordance with the existing "acts regulating immigration, other than those "concerning Chinese laborers."

Answers to Government Brief.

I.—The Government counsel called attention to the terms of the Mexican Treaty, at page 17 of their brief, and we call the attention of the Court to the similarity

between the provisions to be found there and the provisions in the Treaty of Paris of 1898, by putting in parallel columns the provisions of the two treaties.

The Mexican Treaty of 1848 has the following provisions:

"Art. 8. Mexicans now established in Territories previously belonging to Mexico and which remain for the future within the limits of the United States, as defined by the present Treaty, shall be free to continue where they now reside, or to remove any time to the Mexican Republic, etc.

Those who shall prefer to remain in the said Territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said Territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States."

The Treaty of Paris provides as follows:

"Art. 9. Spanish subjects, natives of the Peninsula, residing in the Territory over which Spain, by the present treaty relinquishes or cedes her sovereignty, may remain in such Territory or may remove therefrom, etc.

In case they remain in the Territory they may preserve their allegiance to the Crown of Spain by making, before a Court of Record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the Territory in which they may reside."

In the case of Mexico, the inhabitants of the territory who had not elected to remain Mexicans were "considered to have elected to become citizens of the United States."

In the case of Spain, natives of the Peninsula of Spain who had not declared their intention to preserve their allegiance to Spain were "held to have renounced it and to have adopted the nationality of the territory in which they may reside."

In the Spanish Treaty the privilege of holding to their old allegiance was only given to natives of the Peninsula, consequently all others were necessarily endowed with "the nationality of the territory in which they may reside." There are only two nationalities in the territory which was the subject of the Treaty of Paris, *i. e.*, the Cuban nationality, for the Island of Cuba, and the American nationality for the remainder. The creation of a portion of such territory into the body politic known as the people of Porto Rico, is not an endowment of nationality. There is no Porto Rican nationality.

II.—The case of *U. S.* v. *Laverty*, cited at page 18 to 20 of the brief, is simply to the purport that the annexation of French territory could not change the citizenship of inhabitants of British allegiance.

III.—*Inglis* v. *Sailors' Snug Harbor*, cited at page 22 of the brief, affirms the doctrine for which we contend: That *the allegiance* of all the inhabitants of a subdued and annexed country is due to the new sovereign, and being so due to the new sovereign, they cease to be aliens with reference to such new sovereign.

IV.—*Elk* v. *Wilkins*, relied upon at page 23 of the brief, is based upon the well-known theory that the Indian tribes with whom the United States made treaties were "alien nations, distinct political communities." As members of such tribes owing allegiance to the tribes,

to the "distinct political community" the individual Indian was held incapable of becoming a citizen of the United States by mere abandonment of his tribe and without the assent of the United States in some manner expressed.

The assent of the United States to the "nationalization" if not to the "naturalization" of Porto Ricans, is conveyed in the Treaty of Paris.

V.—The San Domingo case, *Caignet* v. *Pettit*, 2 Dal., 234, at pages 26 to 28 of the brief, is in disaccord with the doctrine of *Elk* v. *Wilkins* and intimates that because a French subject expressed his "dissent from revolution" and "refused allegiance to the new government and withdrew from the territory of France" he thereby ceased to be a French citizen or subject. This evidently he could not do without "becoming the subject or citizen of another country" which he had not done.

The unfortunate individual was not without a country. He had revolted against and repudiated his own, but it was still his.

VI.—The State Department case referred to in pages 29 to 31 of the brief, does not militate against appellant's contention.

Gisbert was, upon the representation of the United States Government that he could not "be regarded as a subject of Spain, liable for military service," exempted from such service.

The Chinaman who claimed American citizenship for his son was shown not to have possessed Spanish citizenship, and thus, under the doctrine of the Laverty case, already cited, to have remained uninfluenced by the transfer of Spanish territory.

Mercado was clearly held to have abandoned his domicile or inhabitancy of Porto Rico by a continued absence of fourteen years, which excluded him from the operation of the treaty, while Molinas, whose absence from Porto Rico was shown to have been with an intention to return, was held to be included within the treaty.

VII.—This statement of the nationality of the appellant, taken from page 36 of the Government brief, is sufficient to show her right to come into the United States and her exclusion from the operation of the Immigration Laws, which are intended as a barrier between the United States and foreign countries and as a protection of Americans from the injudicious admixture of foreigners. "The *previous foreigner* has now come under the sovereignty of the United States; that is the dominant and general allegiance; it involves a corresponding right of protection."

The fact also emphasized at the same page of the brief, that this previous foreigner "is also a member of the people of Porto Rico and thus belongs fully to the local body politic," though "not yet a member of our domestic body politic" we have no quarrel with.

The fact that he is one of the people of Porto Rico does not change his national status as an American.

The shifting "of allegiance and protection impressing the new nationality" upon the Porto Rican as suggested at page 55 of the brief, is quite sufficient to eliminate "the alien's status of the Porto Rican as shown by the quotations which the Government Brief furnished at pages 50 to 52 from *U. S.* v. *Percheman, Downes* v. *Bidwell,* and the *Diamond Rings case:*

The people change their allegiance, their relation to their ancient sovereign is dissolved; but their relations *to each other* and their rights of property remain undisturbed.

> " Doubtless, the subjects of the former sovereign
> " are brought by the transfer under the protection
> " of the acquiring power, and are so far forth im-
> " pressed with its nationality."

> " The Philippines thereby ceased in the language
> " of the treaty to be Spanish. Ceasing to be Span-
> " ish, they ceased to be a foreign country. They
> " came under the complete and absolute sovereignty
> " and dominion of the United States, and so became

"territory of the United States over which civil "government could be established. The result was "the same, although there was no stipulation that "the native inhabitants should be incorporated into "the body politic, and none securing to them the "right to choose their nationality. Their allegi- "ance became due to the United States, and they "became entitled to its protection."

In conclusion therefore, the appellant respectfully submits that, even assuming *arguendo* that petitioner did not necessarily acquire the full status of citizenship, nevertheless her undoubted American nationality is sufficient to entitle her to admission into the United States, and definitely negatives the possibility of her being included within the operation of the Immigration law.

All of which is respectfully submitted.

Dated, New York, December 9th, 1903.

FREDERIC R. COUDERT, JR.,
PAUL FULLER,
Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

No. 225.

ISABELLA GONZALEZ,
Petitioner-Appellant,

vs.

WILLIAM WILLIAMS, U. S. Commissioner of Immigration at the Port of New York.

Statement of the Case.

This is an appeal by Isabella Gonzalez from an order of the Circuit Court of the United States for the Southern District of New York dismissing a writ of *habeas corpus* and remanding petitioner-appellant to the custody of the defendant-appellee United States Commissioner of Immigration at the port of New York (Record, fol. 21).

The petition alleged that petitioner, Isabella Gonzalez, was a native-born inhabitant of Porto Rico and was such at the time of the proclamation of the Treaty of Paris (April 11, 1899); that upon arriving from said island of Porto Rico on the 4th day of August, 1902, the said defendant had detained her in custody, pre-

vented her landing and was threatening to return her to Porto Rico (Record, fol. 1).

The return of the defendant to the writ of Habeas Corpus alleged that pursuant to the powers vested in him by the United States Immigration laws he had detained said Gonzalez as an "alien immigrant," in order that she could be returned as such in case it appeared probable that she might become a public charge (Record, fol. 6).

The Circuit Court dismissed the writ on the ground that the petitioner not having been born in the United States nor having ever been naturalized, retained the same status that she had before the cession of Porto Rico by the Treaty of Paris, consequently she was an alien and the Commissioner had jurisdiction to detain or deport her (Record, fols. 15-17).

The sole question here involved is the alienage of appellant.

If she is not an alien the Commissioner admittedly had no jurisdiction and the writ should not have been dismissed.

The law under which the Commissioner acted is as follows:

United States Stat. at Large, Vol. 26, p. 1084 (Chapter 551) provide:

"That the following classes of aliens shall be "excluded from admission into the United States "in accordance with the existing acts regulating "immigration other than those concerning Chinese "laborers: All idiots, insane persons, paupers or "persons likely to become a public charge. * * *

"Section 8. That upon the arrival by water at "any place within the United States of any *alien* "*immigrants*, it shall be the duty of the command- "ing officer and the agents of the steam or sailing "vessel by which they came, to report the name, "*nationality*, last residence and destination of "every such alien before any of them are landed.

"* * * All decisions made by the inspection "officers or their assistants touching the rights of "any alien to land, when adverse to such right shall "be final unless appeal be taken to the Superin- "tendent of Immigration, whose action shall be "subject to review by the Secretary of the Treas- "ury. It shall be the duty of the aforesaid offi- "cers and agents of such vessel to adopt due precau- "tions to prevent the landing of any alien immi- "grant at any place or time other than that desig- "nated by the inspection officers, and any such "officer or agent or person in charge of such vessel "who shall either knowingly or negligently land "or permit to land any alien immigrant at any "place or time, etc.

"Section 10. That all aliens who may unlaw- "fully come to the United States shall, if practi- "cable, be immediately sent back on the vessel by "which they were brought in. * * *

"Section 11. That any alien who shall come into "the United States in violation of law may be re- "turned as by law provided, etc."

Introduction.

This case is noteworthy in that it involves much more than the liberty of an individual. The answer to the question whether or not petitioner is an alien must settle the status of all the native islanders who were in existence at the time the Spanish possessions were annexed by the United States.

The "Insular Cases" have not determined the question nor are any of the precedents to be found in our history precisely similar to the case of the Porto Rican *ante nati*. This is due to the difference in the nature of our recent acquisitions and those made formerly.

Of the Indian little need be said. Nomad tribes do not long survive the contact with civilization.

The populations taken over from France and Mexico were insignificant in number. They were, moreover, largely of Caucasian race and civilization, and a growing stream of immigration soon made the new lands thoroughly American. Moreover, the two civilizations were in fact equal or nearly so, and the treaties both of Paris (1800) and of Guadalupe Hidalgo (1848), recognized that fact by according to the new inhabitants the rights of American citizens. Thus the problem as to the legal status of the inhabitants of Louisiana and the territory acquired from Mexico was solved or solved itself *ab initio*. The underlying theory upon which both treaties were based was "expansion" rather than "imperialism."

But the problem of to-day cannot be solved either by extermination, as in the case of the Indian, nor by assimilation, as in the case of the few Frenchmen and Spaniards. Neither the methods of Miles Standish nor those of Jefferson will suffice us now. We must move on a heretofore untrodden path and find precedents upon which to base intelligent legislation and administration, not so much in our own history as in that of other nations who have preceded us in attempting to govern non-assimilable peoples.

In such an argument as this we must begin by defining the necessary terms, otherwise we will end as do many legal discussions in having with much clamor demolished a man of straw.

The object is to ascertain exactly what, under existing law, is the constitutional and legal status of the Porto Rican born before April 11, 1899. To call him a citizen when we are in hopeless disagreement as to the meaning of that term will only result in creating added confusion.

If the Circuit Court was correct, then we have to-day a new and seemingly paradoxical legal category of "American Aliens." The object of language is to denote objectively existing facts or relations. What idea the mutually exclusive term "American Aliens" can

convey it is difficult to say. The man without a country would thus be transferred from the realm of poetry into the domain of law, since an affirmance of the decision here appealed from would declare the law of the United States, as expounded by its highest tribunal, to be that there exists under the jurisdiction of the United States a large class of persons who are strangers and aliens here and in every other nation of the globe. There can be nothing in law or in fact to justify or necessitate so extraordinary a result.

Brief of the Argument.

I.—The petitioner-appellant cannot be sent back by the Immigration Bureau unless she is an "alien immigrant." If she does not fall within that class the statute cannot affect her; the Commissioner of Immigration had no jurisdiction, and the writ should have been sustained.

II.—The petitioner is not an alien because on April 11, 1899, she ceased to be a Spanish subject and her allegiance unquestioned, complete and permanent, was transferred to the Government of the United States by the Treaty with Spain proclaimed on that date.

This proposition is demonstrated by the following considerations:

(*a*) Allegiance is determinative of nationality or subjection. Our law of nationality, *i. e.*, the law which determines what persons are American nationals as contradistinguished from foreigners or aliens was derived from and must be examined in the light of the common law. That law makes nationality or subjection dependent upon allegiance.

(*b*) In the United States the tests as to what constitutes "nationality" or "subjection" are the same as the English common law. The problem has here been con-

fused, however, by the use of the word "citizen" in two senses. It is generally and properly used to indicate the holder of political rights or privileges in a State; as has been aptly said of a citizen in a democracy, "one who possesses a homeopathically diluted dose of sovereignty." Such persons may be accurately characterized as active citizens (burghers). The word has also been used in its broad sense as denoting all members of the nation and in this sense it has been considered as identical with subjection at the common law. Such persons may be characterized as passive citizens.

In our history there have been two apparent exceptions to the rule that passive citizenship and subjection are identical, and we have had persons who were neither citizens nor aliens. The free negroes under the Dred Scott decision were held by this Court not to be citizens, even in the general sense, yet they were not aliens but American nationals or subjects because their allegiance, complete and absolute was owing to the United States. Again, the Indian separated from his tribe was not considered a citizen, yet he could not well have been an alien, because he owed no other allegiance than to the United States.

Elk v. *Wilkins*, 112 U. S., 94.
Kazzahoo v. *Adams*, 1 Dil., C. C.

The Porto Rican is, therefore, under our law, a subject or national—the only really debatable question being as to whether he is a citizen in the general sense, having the civil rights and status of such or whether he is a mere subject like the free negro and the Indian above mentioned. In no event is he an alien.

III.—The Judge at Circuit based his decision on the ground that the petitioner, not having been born in the United States, nor naturalized by the Treaty, must have retained her original status just as though Porto Rico had not been annexed; consequently, she remained

an alien. Granting *arguendo* the premises, the argument is fallacious in assuming that because the petitioner is not a citizen, she is necessarily, and *ipso facto* an alien—no such alternative exists. The cession changed her allegiance. That fact is indisputable. The shifting of her allegiance changed her status from that of a Spanish national into an American national. The Court below overlooked the fact that there may be and have been subjects who are not citizens, and that the two are not necessarily exclusive terms. Hence his error. The treaty cession, if it did not *naturalize* the petitioner at least *nationalized* her.

IV.—This distinction between grades or classes of subjects or nationals is illustrated in the history of other countries. The French courts have held Algerians to be French subjects, in consequence of the *de facto* annexation of Algeria—although in the absence of legislation or treaty they could not be French citizens.

V.—A broad view of the Treaty leads to the conclusion that the natives were not only nationalized, but collectively naturalized by the cession.

ARGUMENT.

I.

Jurisdiction of the Immigration Commissioner.

The Commissioner could have no jurisdiction unless the petitioner were an alien. This is clearly stated by the learned Circuit Judge in the court below.

> "The only question open for discussion on this "application is whether or not petitioner is an "alien. Upon all other questions the decision of "the appropriate immigration officers, when ad-

" verse to the admission of the alien is made final, " unless reversed on appeal to the Secretary of " the Treasury. Act of Aug. 18, 1894 (28 Stat., " p. 390).

" It is true that this Court held to the contrary " *in re Martonelli,* 63 F. R., 437, following *in re* " *Panzara,* 51 F. R., 275, but the Act of 1894 was " not before it. The *Martonelli* case was decided " in October, 1894, before the statutes of that year " were published" (Rec., fols. 15-17).

II.

The cession of Porto Rico definitely transferred the allegiance of the native inhabitants from Spain to the United States.

The Treaty with Spain of December 10th, 1898, provides that:

"Article II.

" Spain cedes to the United States the Island of " Porto Rico and other Islands now under Spanish " sovereignty in the West Indies, and the Island of " Guam in the Marianas or Ladrones."

"Article III

" Spain cedes to the United States the arch- " ipelago known as the Philippine Islands, and " comprehending the Islands lying within the fol- " lowing line: * * *"

"Article IX.

" Spanish subjects, natives of the Peninsula, re- " siding in the territory over which Spain by the

"present treaty relinquishes or cedes her sover-
"eignty, may remain in such territory or may re-
"move therefrom, retaining in either event all
"their rights of property, including the right to
"sell or dispose of such property or of its proceeds;
"and they shall also have the right to carry on their
"industry, commerce and professions, being sub-
"ject in respect thereof to such laws as are applica-
"ble to other foreigners. In case they remain in
"the territory they may preserve their *allegiance*
"to the Crown of Spain by making, before a Court
"of Record, within a year from the date of the
"exchange of ratifications of this treaty, a declara-
"tion of their decision to preserve such allegiance;
"in default of which declaration they shall be held
"*to have renounced it and to have adopted the*
"*nationality of the territory in which they may*
"*reside.*"

"The civil rights and political status of the
"native inhabitants of the territories hereby ceded
"to the United States shall be determined by the
"Congress."

The treaty thus definitely accomplishes one legal result, it transfers the sovereignty of Spain over the Islands and their peoples to the United States and with such sovereignty necessarily the allegiance of the people, natives of Spain alone possessing the right to preserve their Spanish allegiance upon complying with the requirements of the treaty. The Porto Ricans have thus ceased to owe allegiance to Spain and now owe it to the United States. Whatever consequences follow from this fact cannot be avoided. But their allegiance or subjection having been transferred, they necessarily have become United States nationals or subjects. No other conditions are necessary to constitute American nationality.

The islanders cannot be aliens unless they owe allegiance to some other government, and even the most advanced anti-Imperialist will not contend that they are

still subject to Spain, however much he may deprecate the making of the Treaty of Paris.

The man without a country is not known to law. Having ceased to be Spanish subjects or nationals, Porto Ricans are no longer aliens and have become United States nationals or subjects.

The treaty actually accomplished a cession of the territory and a transfer of allegiance. It made the territory domestic territory (De Lima *v.* Bidwell, 182 U. S., 1.) The reservation as to political status and civil rights cannot change that cardinal fact. The country ceased to be a foreign country, yet Judge Lacombe holds the native inhabitants to be foreigners.

Aliens are merely foreigners residing or sojourning in the United States. An alien is necessarily a foreigner and must owe allegiance to another country.

> "An alien is a foreigner, a person resident in one "country but owing allegiance to another." Ency. Law, Alien.
>
> "Alien, not belonging to the same country, land "or government or the citizens or subjects thereof; "foreign; as alien subjects, enemies, property, "shores; wholly different in nature; foreign; ad- "verse." Webster's International Dictionary.
>
> "Alien, a stranger born; a person born in an- "other or foreign country as distinguished from a "native or natural born subject or citizen; in "English law, one born out of the legiance or al- "legiance of the king; in American law, one born "out of the jurisdiction of the United States. 2 "Kent's Com., 50. Alien and Foreigner are "synonomous terms. 1 Pet. R., 343." Burrill's Law Dictionary.

When the Porto Rican ceased to owe allegiance to Spain, it is difficult to see how he could still remain a foreigner. He was an inhabitant of domestic territory. Certainly he occupied a different relation to the United States from that which he had previously sustained.

He became subject to its laws and its exclusive sovereignty. These facts must have some significance.

The treaty could not take away his Spanish allegiance, transfer it to the United States and leave him unaffected.

The status of alienage or non-alienage depends upon facts. The facts accomplished by the treaty were none the less facts because the power was reserved to Congress to pass upon the status of the Islanders. Congress cannot make red men white men, even by Joint Resolution, nor can they make Porto Ricans aliens by calling them such. In order to become aliens they would have to pass under another domination. They might be transferred to Spain or ceded to some other power or given independence, but until then they *are and must remain United States nationals.*

The fact of alienage necessarily involves the idea of a power to whom allegiance is due. But no man or woman can owe the debt of allegiance without an equivalent. Who feels the advantage should also bear the burden, says the old adage; but it is equally true that he who is called to bear the burden should derive some benefit or compensation therefrom. What "commodum" or advantage does the appellant reap from her situation? To whom does she owe allegiance, outside of the United States? What nation in the wide world will raise, nay, will be permitted by us to raise a finger or even a voice in behalf of this woman if she is injured in her property and restrained in her liberty? What flag may she look to in her necessity, outside the flag of the United States? Against what Government or nation may she commit treason? And if she should commit such acts, in Porto Rico, against the sovereignty of the United States as constitute that crime, would she go unwhipped of justice because she had not been naturalized a citizen of the United States?

If it should be claimed that a Treaty alone and without an act of Congress cannot raise her out of her condition as a derelict alien, it is plain that such a claim cannot be sustained. The Treaty became from the date

of its ratification the supreme law of the land, and the language here is plain and unequivocal. Spain *cedes to the United States* the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies. This cession, accepted as it was, by the United States, necessarily transferred the sovereignty to this Government. That sovereignty plainly is, as it must be, exclusive of any foreign power.

Either Miss Gonzalez is an undefined waif, on the sea of political uncertainty, or she *belongs* to the United States, and may look to it for protection against injury, for redress where wrong has been done and for assistance where it may be needed against any Government of the earth, Spain included. The new master, viz., the United States, takes her allegiance with a burden, and having deprived her of all claim on the old master, has taken his place.

Other clauses of the Treaty make these considerations even more obvious than they might be if unaided by the terms of that instrument. To some extent, at least, the contracting parties had in contemplation the possible rights of the Spanish citizens who were transferred to a new sovereignty. There is a saving clause allowing an option to *Spanish subjects, natives of the Peninsula,* residing in the territory over which Spain by the Treaty relinquished or ceded her sovereignty. Such residents might *preserve* their allegiance to the Crown of Spain by making before a court of record a declaration of their intention to preserve such allegiance; otherwise they would be held to have renounced it and to have adopted "the *nationality* of the territory" in which they might reside.

> "Manifestly the *nationality of the inhabitants* "of territory acquired by conquest or cession be- "comes that of the government under whose domin- "ion they pass subject to the right of election on "their part to retain their former *nationality* by "removal or otherwise, as may be provided."
>
> Boyd *v.* Thayer, 143 U. S., at p. 162.

This clause may not directly assist Miss Gonzalez, for she is not a native of the Peninsula, and if she were, she has not availed herself of the privilege of filing the necessary declaration within the year. But is it not quite palpable that she has become vested with the same "nationality" as the Spanish native of the Peninsula who has chosen to sever his connection with Spain by failure to file the necessary declaration? It can hardly have been in the contemplation of the parties to the treaty that she and those similarly situated should be without any "nationality" whatever, while other ex-Spaniards assumed by their non-action the nationality of the territory in which they happened to reside. It seems plain that the intention was to make nationality the rule upon which the sole exception engrafted, was that in behalf of the native of the Peninsula. If he was satisfied with the "nationality" of American Porto Rico, he need only abstain from acting at all and the general rule of nationality applied to him.

III.

Allegiance determines Nationality.

(*a*) Nationality, broadly speaking, means simply membership in some political community. In the ancient world it was dependent upon descent (citizenship *jure sanguinis*) the State being based on the clan, *i. e.*, tribal law. The descendant of a citizen was always a citizen wherever born, and the descendant of a foreigner always a foreigner, unless actually naturalized by positive legislation. At Rome the rule was "once a peregrine always a peregrine." The *Jus Sanguinis* thus inherited from the Roman law became the law in Europe, but for obvious historic reasons never took root in England. In that country the rule of *Jus Soli, i. e.*, subjection or citizenship because of birth within the King's

allegiance and dominion, was the law from the time of the Norman Conquest. As Prof. Pollock says:

> "A foreigner at the head of an army recruited "from many lands conquered England, became "King of the English and endowed his followers "with English lands. For a long time after this "there could be little law against aliens, there "could hardly be such a thing as English national-"ity" (History of the English Law, vol. I, p. 443).

Thus it came about that by the English law:

> "As regards the definition of the two great "classes of men which have to be distinguished "from each other, the main rule is very simple. "The place of birth is all important. A child born "within any territory that is subject to the King "of England is a natural-born subject of the King "of England" (*Id.*, p. 441).

Coupled with this rule, which has continued in England to be the law down to the present, was the doctrine of indelible allegiance and consequent denial of the right of expatriation. Hence the rule "once a subject always a subject"—but this doctrine was modified so that the right to change one's allegiance was finally recognized by allowing British subjects to expatriate themselves and aliens to become subjects by letters patent from the Crown or by Act of parliament, *i. e.*, by denization or naturalization.

Thus the sole requisite necessary to constitute a British subject is allegiance or subjection. This subjection, whether due to birth within the King's dominion or to a transfer of allegiance from a foreign sovereignty to English sovereignty, is the one essential requisite for determining the nationality of the individual. Either he owes allegiance to the sovereign or he does not. In the one case he is a subject, in the other he is an alien.

It is quite evident that these two categories include all men and leave no middle class.

Whatever number of classifications may exist as to subjects and what rights, civil or political, belong to each class or how diverse may be the privileges accorded by law or treaty to aliens of one nation or another, the English rule leaves no room for quibble as to who are aliens and who are subjects.

It is quite clear that by the common law a change of sovereignty from a foreign domination makes the inhabitants, both *ante nati* and *post nati,* British subjects.

> "Naturalization by conquest was the conse-
> "quence of that change in the law of war by which
> "the conqueror instead of gaining captives and
> "slaves and property, obtained dominion and
> "subjects. This was the law soon after the arrival
> "of the Normans in England, and was certainly
> "understood to be so as early as the reign of Henry
> "II, when the people of Ireland became his sub-
> "jects from the conquest of the island. Lord
> "Coke mentions in his report of Calvin's case,
> "among the ways by which the denization of an
> "alien may be effected—that of conquest.
>
> "'As if the King and his subjects should con-
> "'quer another kingdom or dominion, *as well ante*
> "'*nati as post nati,* as well they which fought in
> "'the field, as they which remained at home for the
> "'defense of their country, or employed elsewhere,
> "'are all denizens of the Kingdom or dominion
> "'conquered.'" Coke Reports, Part VII, folio 6
> * * * "by such operation of law it is not too
> "much to assert, said Chalmers in 1814, that there
> "had been acquired to the British Empire since
> "the commencement of the present reign forty
> "millions of subjects." (Chalmers' Colonial Opinions, 663) Lawrence's Wheaton. Appendix. p. 894.

The English rule on the subject is admirably ex-

pounded by Lord Mansfield in *Campbell* v. *Hall,* 1 Cowper's Report, 204 (1774). This was an action against the collector of customs of the Island of Grenada to recover certain duties there levied in accordance with a Royal decree. The case thus involved the question as to the power of the Crown over captured territory, Grenada having been captured from the French and Parliament having taken no action in regard thereto.

> "The special verdict then states some articles "of the capitulation. * * * It next states "the 6th Article where to a demand of the inhab- "itants of Grenada, requiring that they should be "maintained in their property and effects, etc., the "answer is the inhabitants *being subjects* of Great "*Britain,* will enjoy their properties and priv- "ileges in like manner as the other, his majesty's "subjects, in the other British Leeward Islands; "so that the answer is that *they will have the con- "sequences of their being subjects,* and that they "will be as much subjects as any of the other Lee- "ward Islands."

Lord Mansfield then states general propositions governing such a case.

> "A country conquered by the British Arms be- "comes a dominion of the King in the right of "his crown; and therefore, necessarily subject "to the legislature, the Parliament of Great Brit- "ain."
>
> "The 2nd is, *That the conquered inhabitants "once received under the Kings protection, be- "came subjects, and are to be universally con- "sidered in that light, not as enemies or aliens."*

The converse of this proposition is equally true. It is so stated by the eminent English commentator on International Law, Westlake.

"The cession of a British territory, or the "acknowledgment of its independence, causes the "loss of their British nationality by all persons "domiciled within it at the date of the cession." Int. Private Law, 203.

Doe *v.* Acklam, 2 B. & C., 779, held that all British subjects in America became aliens on the signing of the treaty recognizing American independence.

In the case of the Stepney Election Petition, 1886, 17 Q. B. D., 54, it was held that Hanoverians, born before the accession of Victoria, were British subjects, *not aliens*, but by the separation of the Crown they became aliens and could not vote in England. Lord Coleridge there said:

"It has long been settled that while the crowns "of the countries, are held by the same persons "the inhabitants of the two countries are not aliens "in the two countries respectively. * * * "

"The Hanoverian by birth who had needed no "naturalization in the life time of William IV "needed it when the Hanoverian heir and the suc- "cessor of that monarch was no longer the sov- "ereign of these islands. * * * He became "an alien because the sovereign to whom his allegi- "ance was due became a foreign sovereign; "* * * The crowns had by accident, been "united in one person, but when the union of the "crowns came to an end the union of allegiance "ceased too."

Thus the English law both ancient and modern is quite plain. Had Spain ceded Porto Rico to England in the same manner as she did to the United States, no possible doubt could have existed that the native inhabitants were British subjects. No question could have arisen here had it not been for the ambiguous meaning of the term citizen in American law.

The United States Government did not claim until this case arose that the islanders were aliens. The Attorney-General in the Insular cases took the position that they were subjects.

> "To be called an American subject is no dis-
> "grace. The term does not imply anything as to
> "the nature or form of the Government of which
> "one is a subject. It imports only that a person is
> "within the protection and allegiance,—either
> "permanent or temporary—of a particular sover-
> "eignty; it may be imperial or it may be republi-
> "can. *It does not signify in any degree the grade*
> "*or status of citizenship occupied by the person*
> "*within the domestic economy of his sovereign.*"
>
> "*The Insular Cases.*" Brief of Atty-Gen., 172.

(*b*) The question as to the meaning of the term citizen and what constitutes citizenship under the United States Constitution and laws, must be examined in the light of the English law.

U. S. v. *Wong Kim Ark*, 169 U. S., 655.

See also

Minor v. *Happersett*, 21 Wall., 162.
Ex parte Wilson, 114 U. S., 417.
Boyd v. *U. S.*, 116 U. S., 616.
Smith v. *Alabama*, 124 U. S., 465.
Moore v. *U. S.*, 91 U. S., 270.

> "The interpretation of the Constitution of the
> "United States is necessarily influenced by the fact
> "that its provisions are framed in the language of
> "the English common law and are to be read in the
> "light of its history."
>
> Justice Matthews in *Smith* v. *Alabama*, 124 U. S., 478.

"British subject means any person who owes "permanent allegiance to the crown" (Dicey Con- "flict of Laws, 173-7). *"Nationality or Allegi- "ance* in substance depended * * * not upon "the locality of a man's birth, but upon his being "born within the jurisdiction and allegiance of the "King of England."

"The term 'citizen' as understood in our law is "precisely analogous to the term 'subject' in the "common law, and the change of phrase has en- "tirely resulted from the change of Government" *Wong Kim Ark.*, 169 U. S., at pp. 657-8-664.

In a very recent case this Court again said:

"The term 'citizen' in our law is precisely "analogous to the term 'subject' in the common "law and the change of phrase has entirely re- "sulted from the change of government. The "sovereignty has been transferred from one man "to the collective body of the people and a 'sub- "ject' of the king is now a 'citizen' of the State."

Hennessy *v.* Richardson, 189 U. S., at pp. 34-35.

That the terms citizen and subject are at present identical in meaning is clear from *Minor* v. *Happersett*, 21 Wall., 162.

"The very idea of a political community, such "as a nation is, implies an association of persons "for the promotion of their general welfare. Each "one of the persons associated becomes a member "of the nation formed by the association. *"He owes it allegiance and is entitled to its "protection.* Allegiance and protection are, in "this connection, reciprocal obligations. The one "is a compensation for the other; allegiance for "protection and protection for allegiance.

"For convenience it has been found necessary to "give a name to this membership. The object is to

"designate by a title the person and the relation he "bears to the nation. For this purpose the words "'subject,' 'inhabitant' and 'citizen' have been "used and the choice between them is sometimes "made to depend upon the form of the govern- "ment. Citizen is now more commonly employed, "however, and as it has been considered better "suited to the description of one living under a re- "publican government, it was adopted by nearly "all the States upon their separation from Great "Britain, and was afterward adopted in the Arti- "cles of Confederation and in the Constitution of "the United States. *When used in this sense it "is understood as conveying the idea of member- "ship of a nation and nothing more*" (pp. 165-6).

As has been tersely said by an eminent publicist:

"The law knows nations only as political com- "munities, as sovereign and independent States. "*Nationality,* therefore, as a legal attribute of per- "sons, is connection with a certain body politic, "membership in a particular State. The members "of a State are called its subjects or citizens. The "former term, if properly construed, is applicable "to the people of any nation without regard to the "form of government, for every State is based "upon the relation of its members to its sover- "eign. But the word subject has become historic- "ally associated with the theories of feudal and "absolute monarchy, and has thus fallen into dis- "favor."

(Encyclopædia Political Science and United States History, article Nationality, by Munroe Smith.)

Mr. Butler in his recent work says that the word nationality is used to "distinguish the people of "the United States as a people rather than as a "race; the people of the United States forming as

"they do, a nation, are necessarily composed of
"many races—Christian and Mohammedan—
"Anglo-Saxon, Teutonic and Latin—Jew and
"Gentile—all of these, as well as other racial ele-
"ments, unite in forming one people as a nation;
"in this sense therefore 'nationality' signifies as to
"the people, the element of homogeneity by which
"all these people are united, regardless of internal
"and sectional differences, into a great nation,
"owing allegiance to a common government as
"against all of the other governments of the
"world."

Butler, Treaty Making Power, p. 16*n.*, vol. I.

Summing up on this point it seems perfectly clear that the transfer of the allegiance of the native inhabitants made them subject to the jurisdiction of the United States; they were no longer foreigners, or aliens, but became subjects or nationals. This is enough for the purpose of the case, but the matter is of such importance that the question may perhaps be elucidated by inquiring whether, if having ceased to be aliens, they have become citizens or whether they form a class of nationals who are not also citizens.

III.

The change of allegiance, while it made the Porto Rican born before the cession a national or subject, did not necessarily make him a citizen.

The steps by which the Circuit Judge reached his conclusion that the petitioner was an alien are as follows:

I.—The inhabitants of Porto Rico were aliens prior

to the ratification of the Treaty of Paris, April 11, 1899.

II.—As such alien inhabitants they could only become citizens of the United States by naturalization.

III.—The petitioner having been born before the treaty, must show that she has been naturalized. She could invoke no law save the treaty of annexation. But conceding the possibility of collective naturalization by treaty, the Treaty of Paris expressly reserved the "civil rights and political status of the native inhabitants" to the future action of Congress.

IV.—Congress not having legislated as to the naturalization of Porto Ricans, they have not become citizens; *therefore, their original status remains unaffected and they are aliens.* Or to use the learned Judge's exact language:

> " Being foreign born and not naturalized, she re-
> " mained an alien and subject to the provisions of
> " law regulating the admission of aliens who come
> " to the United States" (Record, p. 16).

Thus, according to this decision, there is no middle ground between citizens and aliens, and any one who is not an American citizen is necessarily an alien.

"An American alien" certainly would seem, at least to one unaccustomed to some of the startling paradoxes of the law, a strange and monstrous category. Is it a logical result? We think not, and for the following reasons:

It is true that the ninth clause of the Treaty provides that the civil rights and political status of the native inhabitants of the territories ceded to the United States shall be determined by Congress. But this determination belonged to Congress in any event. It may plausibly be contended that the natives of Porto Rico did not

become "citizens" by virtue of the Treaty, for the Treaty does not in terms make, or profess to make, them such. It would be enough for our purpose that it "nationalizes" them, which may be quite different in its effect from "naturalizing" them.

If there is no difference between a national and an alien it was quite possible to exclude Miss Gonzalez from our country, because she had not gone through the forms of naturalization and renounced her allegiance to some foreign power which she would have found it difficult to name. If she had named Spain, which had rejected and repudiated her, an element of humor might be injected into the case, but would not relieve it of its difficulties.

"The political status and civil rights" having been reserved for the future action of Congress, it is possible to argue that no naturalization has taken place; it has, however, already been shown that the Porto Ricans were nationalized, that is to say, their allegiance transferred, but as nationalization does not necessarily mean naturalization, it may well be that they occupy an intermediate status between citizens of the United States and aliens. In other words, they are certainly entitled to the protection of the government, and, as far as foreign nations are concerned, are Americans, yet they may not be vested with all the rights of citizens of the United States.

What these rights of citizens of the United States are, it is very difficult to determine. The trend of doctrine in the Supreme Court of the United States seems to be that most of the rights of citizenship are under the protection of the States themselves, that civil liberty was not nationalized by the Fourteenth Amendment, and that only such rights as are expressly secured by the Constitution of the United States belong to the citizen; that for the vindication of all others he must look to the State. Thus the citizen of the United States who is not also a State citizen, but an inhabitant of a Territory, holds his rights subject to the discretion of Congress,

except in so far as that body may be limited by the express mandates of the Constitution. *Civil Rights cases, 109 U. S., 3.*

In the recent case of *Maxwell* v. *Dow,* 176 U. S., 581 at pp. 588-9, the Court quotes, with approval, the language of Mr. Justice Miller in the *Slaughter House cases,* referring to Section 2 of the Fourth Article of the Constitution, wherein it is provided that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. The Court says:

> "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental;* which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; * * * The enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

It is thus apparent that the rights of citizens of the United States are almost impossible of definition. The general right to life, liberty and property, provided for by the Constitution and more specifically by the ten Amendments in favor of civil liberty, applies to all men alike, whether citizens or aliens. *Wong Wing* v. *U. S.,* 163 U. S., 228. See also Woodrow Wilson, The State, p. 498, §917.

The only positive right conferred by the Constitution

upon a citizen as such seems to be the right to sue in a Federal Court. This was the right which it was held that Dred Scott did not possess because not a citizen. Thus, as far as the Government of the United States is concerned, the inhabitants of the Islands, assuming them to be nationals, but not citizens, could hardly be said to have any lesser civil rights in fact than full citizens of the United States. While they could not sue in Federal Courts, this would scarcely be an additional burden to those that remained at home, because this right only belongs to a citizen of the United States residing in a State. It is not possessed by the residents of the District of Columbia, nor of the Territories of the United States.

As far as the action of the States themselves is concerned, the matter becomes somewhat more complicated. One of the most natural illustrations is as to the holding of real estate in the various States. In many of our States there exists as an obsolete remnant of the old and barbarous *Droit-d' aubaine,* the law by which an alien holder of real estate is subject to an action of forfeiture. This rule, according to the learned Mr. Pollock, arose historically from the habit of the English Crown of confiscating the estates of Norman nobles, situated in England, who swore allegiance to the Crown of France after the separation of Normandy from England. This practice ripened with time into a general rule of law. Its illustrious origin has long been forgotten, and it now remains as a remnant of ancient, time-honored law. History of the English Law, Vol. I, 441-50.

It is to be noted, however, that the right to hold real estate free from any interference on the part of the Government is not a right inherent in the citizen as such, but that the prohibition is simply a disability of alienage. Thus, if our theory be correct, a Porto Rican might well hold real estate in the City of New York, free from molestation by the Attorney-General, because, even if not considered a citizen, he certainly is not an alien, and, therefore, not under the consequent disabilities.

It is thus apparent that there are very few, if any, civil rights which in such a view he would not have in common with citizens.

As to political rights, however, the situation is entirely different. Usually, though not always, the right to vote in the various States is conditioned upon citizenship of the United States, and, if our theory be correct, statutes to this effect might not apply to a Porto Rican national, and thus in the absence of State legislation, especially made to fit his case, he would not be allowed to vote in the States. As some of the States, however, allow aliens to vote, after a declaration of intention to become citizens, this disability could and would easily, if the State desired it, be removed for the benefit of those of our new inhabitants who desired to settle in the States.

As a writer on International Law recently put it (Mr. Randolph, in his excellent article on "The Insular Cases"), "There is nothing in the Constitution of the United States to prevent a State from inviting an immigrant to go from the wharf to the polls and vote for presidential electors." Columbia Law Review.

It is thus manifest that the distinction here made between aliens and nationals is very important for the Islanders themselves, and if held sound by the Supreme Court of the United States, they will not be under the disability of alienage and will enjoy nearly, if not quite, all the ordinary civil rights pertaining to the citizen.

On the other hand, the distinction between the two classes of nationals, namely, citizens of the United States, that is to say, those born or naturalized within the United States, and those not born or naturalized therein, but owing allegiance thereto, is important. If Porto Ricans are not citizens of the United States, all the political privileges accorded by law to citizens as such would not apply to them, and thus in the absence of special legislation they would have no political rights in the various States until the States chose to change their legislation. In so far as the Islanders remaining at home are concerned, they would, in any event, be subject to the complete control of Con-

gress in the matter of political rights, the Constitution placing no limitation upon Congress, acting in and for the Territories, in that respect. In this regard they would be under no greater political disability than inhabitants of the District of Columbia.

It seems to us that this conclusion harmonizes with the general theory of the Treaty makers and the general policy of the government, which is to confer the ordinary civil rights upon the new inhabitants, while withholding from them all political privileges.

It may be asked whether they have the right to trial by jury and to the other civil rights guaranteed by the Constitution. It is sufficient to say that these rights are in no wise dependent, either upon citizenship or alienage. They are accorded to all persons within the United States—although that term is now impossible of delimitation. (Moulor Cases, 182 U. S.)

It is quite possible, however, that the Supreme Court might decide that some of these limitations were only operative upon Congress when acting within the United States, in the narrow sense, proper, and that, therefore, they did not apply to the new inhabitants. (Territory of Hawaii v. Osaki Mankichi, 190 U. S.) It is thus seen that this question is entirely beside that of citizenship or alienage and has only to do with the applicability of certion portions of the constitution when limiting the power of Congress in legislating for the new territory.

This theory, while according to our new nationals certain rights, and conferring upon them a country, does not in any way interfere with the policies of the people of the United States by giving to the new peoples any political power, and hence any voice as to our government or institutions. They are alike cut off, in both cases, from any injurious interference in the destinies of the nation.

It is evident that there may be various gradations or subdivisions of subjection. Subjects may possess varying degrees of civil or political rights as is well said by one of the latest writers upon the subject.

> " Generally the term citizen is used in regard to " the 'national' invested with all civil and political " rights. We must not, however, confuse, as is too " often done, these two terms. *Every national in-* " *deed is not a citizen, although every citizen is a* " *national.* In France, for instance, minors, mar- " ried women and incompetents are not citizens, " but they nevertheless possess French nationality; " they are deprived of political rights and only " possess the enjoyment of civil rights. The Alge- " rians have not even the enjoyment of civil rights; " they are governed by the Mussulman law in their " relation between themselves, and yet they have " been solemnly declared Frenchmen by the *sena-* " *tus consultus* of 1865, and the decisions of the " Court had upon several occasions theretofore " recognized that they possessed this quality " (French nationality)." (Cogordan, La Nation- alité, pp. 7-8.)

The great publicist Bluntschli following the same line of thought, says:

> " The body of full citizens rise above the general " mass of the members of a country or nation. " Full citizenship implies membership in the na- " tion, but more than that, it implies complete po- " litical rights; it is thus the fullest expression of " the relation of the individual to the State." (Theory of the State, English translation, p. 203.)

The framers of the Constitution probably supposed that in the United States, nationality and subjection were identical, that is to say, that all persons within the permanent allegiance of the United States were citizens just as such persons had been subjects of Great Britain before the Revolution. This view seems to have been practically undisturbed in the United States until the famous case of *Dred Scott* v. *Sanford,* 19 How., 399, which held that subjection and citizenship were not

necessarily identical and that there existed a class of persons in the United States who, although not aliens, were nevertheless not citizens. We refer to the status of the free Negro before the enactment of the XIVth Amendment.

> "The words (in the Constitution) 'people of the "United States' and 'citizens' are synonymous "terms, and mean the same thing. They both de- "scribe the political body who, according to our "republican institutions, form the sovereignty, and "who hold the power and conduct the Government "through their representatives. * * * Con- "gress might, as we have before said, have author- "ized the naturalization of Indians, because "they were aliens and foreigners. * * * *The "African race, however, born in the country, did "owe allegiance to the Government, whether they "were slave or free; but it is repudiated and re- "jected from the duties and obligations of citizen- "ship in marked language"* (pp. 404-5).

The question involved in the Dred Scott case was whether a free negro could sue as a citizen in the federal courts, and the decision was based upon the fact that he could not have been a member of the political people. It was the impossibility that he should have been invested with political rights that led the Court to declare him a mere subject.

The status of the colored race was, until the enactment of the XIVth Amendment changed their status, settled by this decision.

Mr. Chief Justice Fuller in his dissenting opinion in the case of *United States* v. *Wong Kim Ark*, 169 U. S., 649, says:

> "Nor would a naturalization law excepting per- "sons of a certain race and their children be in- "valid, unless the amendment has abridged the "power of naturalization. This cannot apply to

"*our colored fellow-citizens, who never were* "*aliens.*" (p. 729).

It was for the purpose of removing from our jurisprudence this class of persons who owed the United States allegiance and yet were not citizens that the XIVth Amendment defined citizenship. This definition made citizenship and subjection at the common law identical, as Mr. Chief Justice Fuller said, in the Wong Kim Ark Case (p. 727) referring to the fact that the 14th Amendment was intended to apply to the colored race:

> "They were not aliens (and even if they could be "so regarded, this operated as a collective nat- "uralization) and their political status could not "be affected by any change of the laws for the "naturalization of individuals."

As this Court said in *Elk* v. *Wilkins,* 112 U. S., 101:

> "The main object of the opening sentence of the "XIVth Amendment was to settle the question, "upon which there had been a difference of opinion "throughout the country and in this Court, as to "the citizenship of free negroes (Scott *v.* Sandford, "19 How., 393); and to put it beyond doubt that "all persons, white or black, and whether formerly "slaves or not, born or naturalized in the United "States, and owing no *allegiance to any alien* "*power,* should be citizens of the United States "and of the State in which they reside."

The only other instance in the history of the United States in which subjection and citizenship have not been identical is that of the status of the Indian living apart from his tribe and who has assumed the habits of civilization.

In the case of *Elk* v. *Wilkins, supra,* it was held that an Indian, born a member of one of the tribes, who was voluntarily separated from his tribe and had taken

up his residence among the white citizens of a State is not a citizen of the United States within the meaning of the XIVth Amendment.

The theory as to the legal status of Indians has always been, since the case of the Cherokee Nation *v.* Georgia, 5 Peters, 1, that the Indian member of a tribe owed immediate allegiance to his tribe, which was in turn under a general protectorate of the United States, and hence did not come either within the definition of subjection at the common law, or within the purview of the XIVth Amendment. Consequently it was necessary to consider him as an alien, a member of a tribe which the United States recognized at least as *quasi* independent by making treaties with it.

> "The Indian tribes, being within the territorial "limits of the United States, were not, strictly "speaking, foreign States; but they were alien "nations, distinct political communities, with "whom the United States might and habitually "did deal, as they thought fit, either through "treaties made by the President and Senate, or "through acts of Congress in the ordinary forms "of legislation. The members of those tribes "owed immediate allegiance to their several tribes, "and were not part of the people of the United "States" (*Elk* v. *Wilkins*, 112 U. S., p. 99).

On this theory, therefore, Elk was held not to be a citizen of the United States; having, however, renounced his allegiance to his tribe, it would seem that he had become at least a subject of the United States, and this was the view expressed by Mr. Justice Harlan in his dissenting opinion.

> "If he (Elk) did not acquire national citizen- "ship on abandoning his tribe and becoming, by "residence in one of the States, subject to the com- "plete jurisdiction of the United States, then the "Fourteenth Amendment has wholly failed to ac-

> "complish, in respect of the Indian race, what, we "think, was intended by it; and there is still in "this country a despised and rejected class of per- "sons, with no nationality whatever, who, born in "our territory, *owing no allegiance to any foreign* "*power,* and subject, as residents of the States, "to all the burdens of government, are yet not "members of any political community nor entitled "to any of the rights, privileges, or immunities of "citizens of the United States" (*Elk* v. *Wilkins*, 112 U. S., p. 122).

Evidently Congress considered that an end should be put to so anomalous a situation and soon enacted that Indians who had separated themselves from their tribes and taken up civilized life should be considered citizens of the United States. (24 Statutes at Large (1887), chap. 119, sec. 6, p. 388, at p. 390.)

We have instanced the case of the free negro and of the Indian separated from his tribe, as the only illustration within our history in which it was possible to consider that we had a class of persons who, while owing allegiance to no foreign government, were not citizens, but merely subjects of the United States.

This is doubtless due to the fact that in our history we have been so little brought into contact with races inferior to us in development and civilization. Our former growth has been rather by expansion and assimilation than through the method of imperialism, *i. e.*, the domination over men of one order or kind of civilization, by men of a different and higher civilization. The negro problem was set at rest by the war and the Fourteenth Amendment; the Indian problem by the ruthless progress of civilization, which compelled the opening up and exploiting of the American continent by the overflowing population of old Europe. In the contact, the Indian gradually perished and the problem was reduced to very minor proportions through the agencies of fire water, gunpowder and well-intended but unwise policy.

The logic of events is often more powerful than that of Aristotle.

IV.

Illustrations of distinction between subjects and citizens.

Other civilized nations have, however, been brought into contact with uncivilized or semi-civilized tribes or people who became wholly subject to their jurisdiction, and whose legal status it was consequently necessary to solve.

We have seen that the English law has always treated such persons from the moment of the severance of their allegiance from their former masters as British subjects.

This natural and necessary consequence is also admirably illustrated by one of the most recent territorial acquisitions of France,—that of Algeria.

> "The conquest of a country like Algeria gives "rise to questions which cannot be governed by the "application of the ordinary rules of law followed "in Europe. In practice it has been admitted "that the Algerians were *French subjects*, not citi- "zens (it must be remembered) from the moment "that their country was definitely annexed to "France. Hence the tribunal of Paris did not "hesitate to declare, even before the treaty of "Tafma, of 20th of March, 1837, that the Alge- "rians were like other Frenchmen, dispensed from "the necessity of furnishing security for costs," Cogordan, La Nationalité.

The question was thus very similar to that involved in this case, as in neither case had the executive or the legislative authorities conferred any rights of citizenship

upon the annexed people, but their allegiance had been transferred from their former sovereign to the new one. The Court of Cassation declared that although there was no legislation fixing their status, and it had not been established by any treaty, nevertheless the Ordinance of the 10th of August, 1834, had submitted the Algerians to French law and sovereignty, and from that time it was no longer possible to treat them as aliens.

> "In declaring in its Art. 109 the union of "Algeria and the Colonies to the French Republic, "the Constitution of November, 1848, did not ef- "fect anything as to the nationality of the inhabi- "tants; since we find the counsel for the order of "lawyers of Algeria contesting the claim of a "native to be a Frenchman and hence the "possibility of his admission to the bar; "this case coming before the Court of Cassa- "tion it was held that by the very fact of the "conquest of Algeria the Israelite natives became "French subjects. Placed, indeed, under the "direct and immediate sovereignty of France, they "are unable in any event to claim the benefit or "aid of any other nationality, *from which it fol- "lows necessarily that the quality of Frenchmen "can alone thereafter be the basis and rule of their "civil and political condition.*" Glard, Nationalité Francaise, p. 380.

In matters of private law the Mohammedan subjects were left under their own rules and customs.

The French Government thus recognized a situation which we, until very recent years, refused to recognize in the case of the Indians, namely, that such tribes or peoples living under a different law and civilization, possessing a complete organization of their own, should be treated as nationals of the sovereignty to which they were really subject, but should be in their private relations governed by their tribal law. While we did not interfere with the tribal

law of the Indians, we yet affected to assimilate them rather to a foreign people than to nationals, and made treaties with them, in preference to legislating for them directly. Our legal theory was thus at variance with the actual facts.

The Algerian subject is accorded no political rights whatever and can possess none except by becoming a French citizen. This the Algerian may become either by legislation, for example, the Décret Crémieux, October, 1870, conferred French citizenship on the Israelite inhabitants of Algeria, or by naturalization, but this naturalization is somewhat different from the naturalization of an alien. The Algerian has only to make a simple declaration before the mayor, and after examination as to morality, etc., by the mayor and upon the recommendation of the Council of State, the naturalization is granted as matter of right.

Already French, the native Mohammedan is subject after his naturalization to all the French civil and political laws; he pays the French and not the Arab taxes. He becomes immediately an elector, and eligible to Parliament, etc.

Glard, Nationalité Francaise, 263.

An analogous question was presented when France annexed Cochin China. The native Anamite inhabitant is declared by law (Decree 25th, 1881) French, but he remains subject to his own local laws and customs except in special cases in which by complying with certain formalities he may be placed under the jurisdiction of the French law, just as in Algeria he may acquire the civil rights of a citizen by showing that he has reached the age of twenty-one and is able to speak the French language, etc. (Cogordan, La Nationalité, p. 139).

By the cession of Taïti to France in lieu of the former protectorate, the whole native population became French subjects. The law (31 Dec., 1880), declared that "French nationality has been acquired (*de plein droit*) by all the former subjects of the King of Taïti."

"Such a disposition is self-explanatory; the "sole manner of escaping the result is emigration "or the acquisition of a foreign nationality; they "are no longer subjects of the king of Taïti" (Glard Nationalité Française, p. 408).

See also other illustrations mentioned in Argument for Plaintiffs in Error De Lima *v.* Bidwell, 182 U. S., 76-78.

We have thus seen that subjection is dependent upon allegiance, but that the civil and political rights of subjects may vary from those of the subjects who have full political rights (active citizens) to those who have limited civil rights (mere subjects). In our law and that of civilized States generally, except in cases of dependencies inhabited by semi or uncivilized people there are but two classes of subjects or citizens, namely, active citizens, that is to say those possessing political rights (burghers), and passive citizens, that is to say, those possessing full civil but no political rights, such as minors, women and incompetents. It is only, as the historic illustrations cited have shown, when civilized nations come into contact with people of a lower order of civilization that there is any disposition to refuse to subjects the ordinary civil rights. In Europe and America even aliens possess almost, if not quite all of the civil rights belonging to citizens, such as the right to possess property, to have recourse to the courts, etc.

It is for this reason that it has been difficult for us to apprehend that naturalization did not necessarily comport naturalization and that persons might cease to be foreigners or aliens without becoming citizens. We have seen that under our law the civil rights of citizenship in a broad sense, which would not also be possessed by any subjects or nationals of the United States, would be very few—the right to sue in the Federal Courts would be almost the only one belonging to passive citizens as distinguished from mere subjects. The fact that a national

was deprived of these rights would not convert him into an alien and he would not be governed by the laws relating to alienage.

V.

Conclusion.

There are three possible courses which this Court may adopt:

1. It may affirm the decision below and declare native islanders, born before the cession, aliens.

2. It may hold that the cession by transferring the allegiance of the natives made them United States subjects or nationals and that as such they are not under the statutory disabilities of alienage and cannot be deported under the Immigration law.

3. The Court may take the view that the cession of the Islands accomplished the naturalization of the native people and that they became passive citizens of the United States entitled to all civil rights of such.

See argument of undersigned counsel, De Lima *v.* Bidwell, 182 U. S., p. 3.

It seems to us quite obvious that the choice will be between the last two. It would be impossible to affirm the judgment of the Court below without leading to an absurd and unnecessary result. Plain terms would cease to have any meaning and we would consider aliens persons who owed us their sole allegiance and to whom we owed our protection. Such a result is too palpably defiant of the laws of thought and language, is altogether anomalous and we must respectfully submit is clearly impossible.

The Court might, however, adopting the suggestion of the Circuit Judge that the treaty expressly refrained from naturalizing the native population, hold that they were not citizens, and as such not possessed of any civil rights, but that they had become American nationals or subjects and were therefore, not within the purview of statutes aimed at aliens.

This result could be supported by the precedent of the free Negro and the detached Indian,

> *Dred Scott* v. *Sanford,* and *Elk* v. *Wilkins, infra,*

and was the view taken by the Attorney-General of the United States at the time of the argument of the Insular Cases. While it has some logical force and may be supported by the two precedents referred to as well as by the precedents adduced from the history of foreign nations, such as that of Algeria, it seems to us nevertheless to be a narrow view.

The third view would seem to be more compatible with sound political science, as well as more in accord with the spirit of our Constitution, and the jurisprudence of this Court. While it may be said that the treaty reserved to Congress the right to pass upon the civil rights of the native inhabitants, the treaty could not change facts. It had accomplished the cession and the results naturally and necessarily following from cession cannot be avoided.

It could not have made the country a foreign country by stating that it should remain foreign although ceded to the United States and subject to its plenary jurisdiction.

Even the treaty-making power and Congress together cannot change facts by violating the laws of language.

It therefore seems to us that the cession of the territory, its becoming domestic territory (DeLima *v.* Bidwell), with the transfer of the allegiance of its inhabitants, naturalized the natives in the sense that they became passive citizens of the United States, enti-

tled to all the rights, privileges and immunities of such. Boyd *v.* Thayer, 143 U. S., 162.

Unless we adopt this course we are forced to have recourse to the two precedents in our history of which we are least proud, and to introduce for the third time into our system a class of persons whom it has always been our object to be free from. The XIVth Amendment, annulling the result of the Dred Scott Case, the Act of Congress doing away with the result reached in Elk *v.* Wilkins, would go for naught, and we would again be confronted by a situation in which citizenship and subjection were not identical.

The two precedents above adverted to give us no encouragement to attempt for the third time a repetition of that peculiar, and, from the standpoint of American civilization, most anomalous result.

All of which is respectfully submitted.

Dated, New York, November 30, 1903.

FREDERIC R. COUDERT, JR.,
PAUL FULLER,
CHARLES E. LEBARBIER.
Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

ISABELLA GONZALEZ, Appellant, vs. WILLIAM WILLIAMS, United States Commissioner of Immigration at the Port of New York.	No. 225.

WASHINGTON, D. C., Friday, December 4th, 1903.
2.30 o'clock, P. M.

The above-entitled cause came on for hearing before the Court after recess, the Chief Justice and all the Associate Justices being present.

Present on behalf of the petitioner-appellant, FREDERIC R. COUDERT, Jr., Esq., and PAUL FULLER, Esq.
Present on behalf of the United States, HENRY M. HOYT, Esq., Solicitor-General, and MILTON D. PURDY, Esq., Assistant Attorney-General.

Argument of Frederic R. Coudert, Jr., Esq., on behalf of the Petitioner-Appellant.

MR. COUDERT: If the Honorable Court please: This, again, is a Porto Rican case. I may preface by saying that it differs from the other Porto Rican cases that have

been argued at this bar at various times, in that it does not involve, as we understand it, any constitutional questions as distinguished from rights obtained under the Treaty of Paris and conferred by the common law; and therefore, the question as to whether the Constitution is there in force or not, or whether it is in modified force or not, is not here pertinent. The situation that has arisen here is a kind of an aftermath, I may say, of the insular decisions; it shows the length to which the Government has gone in interpreting those decisions as to the rights of people in the Territories.

This is an appeal by Isabella Gonzalez, a native-born Porto Rican, born before the cession, a young woman, from an order of the Circuit Court dismissing a writ of *habeas corpus,* and remanding the petitioner Gonzalez, to the custody of the defendant-appellee, United States Commissioner of Immigration at the Port of New York, in order that she might be returned under the Immigration law to Porto Rico, from whence she came to New York.

JUSTICE HARLAN: You say "before the cession." Was she born in Porto Rico?

MR. COUDERT: In Porto Rico, before the cession.

Isabella Gonzalez arrived at New York. She was detained by the Commissioner of Immigration under the United States Statute. The statute is very short, conferring jurisdiction upon that Commissioner; and as it is the basis of our contention, I will read it. It is on page 2 of our brief. It was admittedly acting under that statute, and without regard to any other power conferred upon him by any other law, that he detained the petitioner, examined her, and decided that she was liable to become a public charge, and therefore that he had a right to send her back. The statute says:

"That the following classes of *'aliens'*—note the word —shall be excluded from admission *into the United States* in accordance with existing acts regulating immigration"—note the word "immigration"—"other than those concerning Chinese laborers; all idiots, insane

persons, paupers, or persons likely to become a public charge. * * *

"That upon the arrival by water at any place within the United States of any alien immigrants"——

That is the category over which the Commissioner has jurisdiction, over alien immigrants——

"It shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came, to report the name, nationality, last residence," etc., "of every such alien before any of them are landed. * * * That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in."

JUSTICE HARLAN: Was the petitioner coming here with any purpose of business, or is that material in the case?

MR. COUDERT: She was coming here, I think the record shows, to be married and to settle here. She had an uncle or relative who agreed to take charge of her and support her. This is all in the record, although, perhaps, not very material. He was a printer, and received a salary of twenty-five dollars a week. They held that that was a small amount, he had a large family, and that she might become a public charge; and they sent her back to Porto Rico, just as they would send her back to Austria, Hungary, or Turkey, if she had come from there and had small means.

JUSTICE DAY: When was this done, Mr. Coudert?

MR. COUDERT: I do not remember the——

JUSTICE DAY: It was after the exchange or ratification?

MR. COUDERT: Oh, yes, if your Honor please; it was on the 4th day of August, 1902.

JUSTICE DAY: And after the legislation concerning Porto Rico?

MR. COUDERT: It was after the legislative act concerning Porto Rico; yes, if your Honor please. It was a year after that. It was about a year ago.

There is no question of jurisdiction here. The judge below admitted that the sole question was whether or not the petitioner was an alien. Of course, I am quite well aware that under the Congressional statutes, the Commissioner has power to determine whether aliens shall be returned or not, and a great many questions concerning aliens. His jurisdiction, however, fundamentally depends upon whether the person is an alien or not. I assume (I have not seen the brief of the other side, it having just been submitted, and therefore I am arguing to the contentions of the Court below, which I presume have been adopted by my friends) that if I, a citizen of the United States, were coming from Europe, the Commissioner could hardly detain me and decide whether I was an alien or not, and if he considered that I was an alien return me to Porto Rico, or to France, or to England, or to anywhere that he chose. That, of course, would be an absurdity. The rights of American citizens cannot be determined by the Commissioner. The question is whether a person is an alien or not; and if the person is an alien, of course the Commissioner has jurisdiction under the immigration statutes which apply to aliens. If there is no alienage, of course, the basis of his jurisdiction fails; he has none. The Court below took that view. Judge Lacombe said that upon all other questions than that of alienage the decision of the appropriate immigration officers, when adverse to the admission of the alien, is made final unless reversed and appealed to the Secretary of the Treasury. So that the sole question, open for discussion in the application, is whether or not the petitioner is an alien.

If the Court please, this case seems to involve considerably more than the liberty of this one unfortunate woman, however precious that may be. It involves the status of a great many thousands, possibly millions of people, who, whatever else they may be, are subject to our laws, are subject to our will, are wholly subject to the government of this country.

The insular cases have not determined the question;

nor are any particular precedents to be found in our history, as it seems to me, similar to the question presented at bar. The expansion, or, as I think, more properly imperialism in which we have indulged in our colonial venture, is something different from any expansion that we have ever had before. The Indian problem was solved by gunpowder and fire-water and misguided philanthropy, and the same question did not arise. The question here is as to the legal status of a great, coherent mass of civilized people, who cannot and of course will not be exterminated, and who can not be assimilated as were the few Frenchmen and Spaniards in Louisiana and Mexico. The question is, what relation in our law do they occupy? Are they citizens? Are they subjects? Are they nationals?

So much by way of introduction, as showing (as we think) the important and the far-reaching effect of this decision.

The decision of the Commissioner was rendered under instructions from the Secretary of the Treasury. Naturally he asked for instructions on so delicate a subject; and he was informed that Porto Ricans should be treated as aliens. The order of the Secretary of the Treasury is to be found in our brief or in the brief filed by my esteemed friend the Commissioner from Porto Rico, as *amicus curiae*. There has been a curious condition of affairs in regard to this question. Once or twice before Porto Ricans had been detained. Professor Stanley Gomez, of Porto Rico, a well-known and learned gentleman, had been detained, and the Commissioner of Immigration sent to the Treasury Department for instructions, and the Treasury Department said they thought he was an American, and they let him go. Certain works of art painted by a native Porto Rican in Paris, but a Porto Rican who had not been in Porto Rico at the time of the cession, were brought in; and the question was whether they were the productions of an American artist. It was held, prior to this case that they were American paintings. How

they could have been American paintings if the painter had been an alien it is a little difficult for me to conceive. But the situation into which the immigration officers got themselves in admitting these people first under some theory that they were Americans and then finally keeping them out and treating them as aliens, is ridiculous and untenable.

The question, therefore, is simply this: whether the immigration law of 1882, which I have read, applied to a native-born Porto Rican; in other words, whether native-born persons in existence before the cession are included in the category "alien immigrants." If they are, if they are aliens in our country and under our flag, then when they come to New York or Boston I presume that they can be excluded at the discretion of the Commissioner, just as aliens from any other country can be. I do not dispute that.

JUSTICE HARLAN: Is there any question made here, or was there any in the Court below, or did the Court below consider, the question of the finality of the decision of the Secretary of the Treasury?

MR. COUDERT: The Court below said that the decision of the Secretary of the Treasury would be final in all cases where persons were aliens, as to whether certain aliens should go back. But, as he says, the jurisdiction of the Commissioner is predicated upon the fact of alienage. I do not suppose you or I, sir, could be detained by the Commissioner while he inquired into our status, and if he determined we were aliens he could send us back and we could not invoke the courts. Such a result, of course, would be an absurdity. He had no jurisdiction over us. His jurisdiction is over aliens. I do not think the Government will seriously dispute that.

JUSTICE WHITE: In other words, the question of finality is involved in the question of the merits?

MR. COUDERT: Precisely, sir—precisely. If, as your Honor has expressed it, the Commissioner had a right

to adjudge finally, then it was because they were aliens. I am glad you made that so clear.

JUSTICE HOLMES: A case arose in Massachusetts where a commission was appointed and was authorized to destroy horses that were suffering from some disease—I forget what—and in which it was held that the jurisdiction of the commission, although it involved the question of merits, depended entirely on the horses actually having the disease; and if it should be proved before a jury afterwards that any of the horses did not have the disease, then an action lay.

MR. COUDERT: I think this case would depend upon the disease of alienage.

JUSTICE BROWN: Suppose an unnaturalized resident of this country, we will say an alien, who had lived in this country for some years, went to Bermuda, we will say, and came back again: Would the law apply to him or not? Could he be excluded?

MR. COUDERT: That would depend on what the law says as to exactly what an "immigrant" means. I confess that I do not know. That is a puzzle. That would depend upon the term "immigrant." He would certainly be an alien. Whether he would be an immigrant or not would be another question. I should say, without knowing of any particular decision in point, that any alien migrating into the country or coming in at any time would be an alien immigrant.

JUSTICE BROWN: Does the statute use the word "alien immigrant?"

MR. COUDERT: It does in one part, if your Honor please. I will read it again:

"That the following classes of *aliens* shall be excluded from admission into the United States."

The term "alien" there, is used first alone. Then, in the body of the statute, it goes on:

"That upon the arrival by water at any place within the United States of any *alien immigrants.*"

I should say it would be fair to assume that the terms "alien" and "alien immigrant" are used as having one

and the same meaning, though in the first section of that same statute allowing the Commissioner to exclude it says that "the following classes of *aliens* shall be excluded from admission." Is that clear?

JUSTICE BROWN: Yes.

MR. COUDERT: Therefore we have advanced thus far that the jurisdiction of the Commissioner depended upon alienage; and the question is wholly, under the statute, as to whether these people were aliens or not.

We contend, first, that the petitioner is not an alien, because on April 11th, 1899, she ceased to be a Spanish subject, and her allegiance, unquestionable, absolute, permanent, was transferred to the Government of the United States by the treaty with Spain made on that date. I do not suppose it is necessary to argue before this Honorable tribunal what seems to us such a fundamental proposition, viz, the fact, uncontrovertible, undeniable, accomplished, that her allegiance was transferred. She had no other allegiance. Even the most advanced anti-imperialist would not claim that she still owes or owed, after the ratification of the treaty, allegiance to Spain.

JUSTICE BROWN: I was under the impression that there was an Act of Congress incorporating or appointing a government for Porto Rico that used the expression "citizens of Porto Rico."

MR. COUDERT: "Citizens and people;" "people," I think, of Porto Rico; "citizens" of Porto Rico; but——

MR. FULLER: Including native American citizens who might happen to be there.

MR. COUDERT: I go back to the treaty because the treaty seems to us to have transferred her allegiance. I do not know that the Government act throws much light on the subject. It evidently endeavored to dodge the question as to what their status was by saying that they were people of Porto Rico.

JUSTICE DAY: That section of the law is on page 8 of the record.

MR. COUDERT: I have the record before me. I was reading that law from my brief, on page 2.

JUSTICE DAY: The one Mr. Justice Brown inquired about, I think, is that section that Judge Lacombe quoted.

MR. COUDERT: That is, the people of Porto Rico?

JUSTICE DAY: Yes—as to their status as citizens of Porto Rico.

MR. COUDERT: Yes—citizens of Porto Rico, if your Honor please.

Now, the petitioner's allegiance was transferred. She had no other allegiance.

JUSTICE DAY: She was not within the class that were permitted to retain their allegiance to Spain?

MR. COUDERT: She was a native, if your Honor please. That appeared in the record. There is no question about that. She was a native. Her allegiance was completely transferred—I may be permitted to mention a notorious fact, although it is not in the record. Some of these unfortunate people went to the U. S. Commissioner and asked if they could be naturalized. The Commissioner told them they must foreswear their allegiance. They were very much embarrassed as to what allegiance they would foreswear, and they told him that they had none except that of the United States. He then said that he did not know how they could become citizens of the United States, because that he did not suppose that the naturalization laws meant that you should foreswear your allegiance to the United States in order to obtain allegiance to the United States and become a citizen. So that they were unable to do anything; and this case, coming up to this Court in the way that it has, will necessarily determine the question of their status.

The treaty provided that Spanish subjects, natives of the peninsula should have the option of retaining their nationality or *adopting* "the nationality of the territory in which they resided." And this phrase is very

pertinent, it seems to us, and pretty conclusive. If they did not retain Spanish nationality they were then held to have renounced it, and to have adopted the nationality of the territory in which they might reside. But, nationality is evidently determined by allegiance. A territory may be said to have the nationality of whatever country or independent sovereign government is over it. Therefore the Spanish inhabitants who remained had the same nationality as the native inhabitants; that is to say, the same nationality as Porto Rico, *i. e.*, American.

Their allegiance having been transferred absolutely and completely, our proposition is as follows:

Allegiance is determinative of nationality or subjection. Our law of nationality—that is to say, the law that determines what persons are American nationals as contradistinguished from foreigners or aliens (there must be a rule to determine that, and there is one, which is very clear), is derived from the English, the common law; consequently it must be examined in the light of the common law.

The common law makes nationality or subjection dependent upon allegiance. Discover the allegiance of an individual, and you have his nationality. Every individual must have some nationality. There are unfortunate individuals who, owing to the conflict of various European laws, have a double nationality, who may be liable to serve in the German army while having been naturalized in America. But the trouble with them is that they have too much nationality, not too little.

Nationality, therefore, is determined by allegiance; and the question of allegiance—that is to say, to whom allegiance is due—is determined by the common law. According to the common law, the question is quite plain. The criterion of the common law, as laid down in the case of Wong Kim Ark, the Chinese baby case, which went over the whole matter, was allegiance to the King. Birth or naturalization or nationaliza-

tion "within the obedience of the King" were determinative of subjection at common law.

As I understand it, subjection and citizenship have, with two possible exceptions, been, in this country, identical. That is to say, the tests which determine subjection as understood at the English common law determine citizenship, as that expression is used in the American law. The word "citizen" is the municipal law equivalent of the word "national." A debate arose, I think about 1800, in France, when the Consular Constitution was discussed; and the famous Abbé Sièyes proposed a constitution in which he spoke of French subjects. Immediately the old adherents of the Revolution rose up in horror and said: "All Frenchmen are citizens. We have no subjects. Subjection is an abhorrent term and has been abolished." Sièyes showed, however, quite conclusively, as appears in Mr. Thiers' "History of the Consulate and the Empire," that the terms "subject" and "citizen" were equivalents in international law, the term "citizen" being the term usually used in a country having a form of government not kingly or royal, possessing republican institutions; but that in either form of government every person belonged to one of two classes. He either owed allegiance to that government or he owed allegiance to some other government, and the persons who owed allegiance to that particular government were subjects in the broad sense of the word, and hence allegiance and subjection went together.

That was the English law. It is very old. It comes down from Norman times; and Pollock and Maitland explain, in their learned work on the "History of the English Law," that every person who owed allegiance to the crown was an English subject. Some curious instances of that have come up in the English Courts. In the annexation of the Island of Grenada, in the West Indies, described fully in the case of Campbell *v.* Hall, Lord Mansfield was confronted with the question as to the status of the native inhabitants of Grenada. It is very kindred historically to the

particular question here involved. Mansfield said, in substance: Their status is plain; from the moment that their allegiance was shifted they became British subjects. They could have no other possible status, both *ante-nati,* those born before the cession of Grenada, and *post-nati,* those born after the cession of Grenada.

Again when Hanover and Great Britain were under the same king, George the First, Hanoverians were held to be British subjects because the allegiance of both was the same; and in an earlier famous case, Calvin's case, when Scotland and England were united under one crown under James the First (the case of the *post-nati*), Lord Coke held that the allegiance of Scotchmen being owed to the King of England as king, therefore they ceased to be aliens and foreigners, to use his expression, in England, and became English subjects. And that doctrine was re-affirmed in a later case, Lord Coleridge writing the opinion, in which the question came up after the separation of England and Hanover upon the death of William IV, the English crown having passed to Queen Victoria, and, by the Salic law the Hanoverian crown having gone to the Duke of Cumberland, the heir in the male line. Certain Hanoverians attempted to vote in England as they had done before, as English subjects; and in the Stepney Petition case (I have forgotten the volume of the reports; I think it is cited in the brief) the Court held that while, at the moment of the joinder in one allegiance of Hanover and England, Hanoverians ceased to be foreigners and aliens in England, and possessed the rights of British subjects, yet from the moment when the crowns were separated, the allegiance was dissolved, and therefore they were not subjects any longer. In discussing the doctrine in Calvin's case, he said it was immaterial whether allegiance to the King was personal allegiance (as he expressed it), that "damned and damnable doctrine," or whether it was allegiance to the King as representing the whole people—allegiance to the crown, in other words; but that in any event the allegiance had been severed, and

therefore the converse of the proposition was true, and the Hanoverians had ceased to be English nationals.

That has been the rule in England from the earliest times, and is the rule in England to-day. In England there can be only two classes of persons, and those classes are mutually exclusive—aliens and English nationals or subjects.

I have used the word "national" because it is the equivalent of "subject." It has, perhaps, a less arbitrary sound, and it is used by many writers on international law.

JUSTICE BROWN: Does not one of the amendments to the Constitution define "citizens" as those born in the United States or naturalized?

MR. COUDERT: It does; and, if your Honor please, I want to take that up now. I wanted to show first what the English law was, and that our law was taken from the English law.

Mr. Justice Gray, speaking for the Court in the Wong Kim Ark case, said: The terms in the Constitution and in our law, "citizens," etc., must be determined with a view to the English law and to the canons laid down in the English law for determining subjection.

Under the English law, therefore, a person was a subject or he was an alien and a foreigner; so that if the question had at any time arisen in England there could not to be the slightest difference of opinion or question about it.

The question for us to determine here is whether our criterion is the same; whether we have adopted any different rule, so that subjection (or nationality, as I call it,) and alienage are to be determined by different rules than the rules laid down in the common law.

JUSTICE DAY: In other words, you make the claim that a person may not be a citizen and may not be an alien?

MR. COUDERT: I am about to make that claim.

We have reached the point, therefore, where from the standpoint of English law, and clearly from the

standpoint of international law, according to all the writers, such a person would be a United States subject or national; that is, a person owing allegiance to the United States. I have quoted in some of the papers here Cogordan's excellent book on "Nationality," in which he claims that persons must be either nationals or aliens, and that all persons owing allegiance to any government are nationals.

JUSTICE HOLMES: What book did you say?

MR. COUDERT: Cogordan's work on "Nationality."

JUSTICE HOLMES: I do not know it. You may have noticed Lord Cockburn's little pamphlet on the same subject.

MR. COUDERT: I have seen extracts and quotations from it in some of the public law writers; and I think, if your Honor please, that we have quoted it somewhere.

What is the situation so far as our law is concerned? My proposition, in answer to Mr. Justice Brown's kind question, is this—that at the American law citizenship and subjection, with two exceptions, have always been identical; that is to say, a person is either a citizen or a subject.

There are two exceptions; and in reply to Mr. Justice Day's contention I am coming to this point, that admitting, as we must——

JUSTICE DAY: I beg your pardon; it is not a contention.

MR. COUDERT: I stated it erroneously; I should have said "suggestion." I said that because it was in line with my contention here, and naturally it seemed to me to be sound.

JUSTICE DAY: I am trying to get your view, Mr. Coudert, as an aid to me in making up my opinion.

MR. COUDERT: Yes, if your Honor please; and it is an aid to me to have you put questions to me, so that I can order my argument to meet the suggestions of the learned justices.

My view is this, that it is quite possible that under the American law subjection and citizenship are not neces-

sarily identical; that there have been two instances, and only two, so far as I can find, in the history of American law, in which subjection or nationality and citizenship were not determined by the same tests, and persons were American nationals who were not also American citizens.

JUSTICE DAY: Would not "allegiance" be a better word than "subjection" there?

MR. COUDERT: Well, I use the word "subjection" because it is the common-law term. I have used "nationality" because it is an international law term, used by modern Italian and French writers on the subject, but said by them to be equivalent to "subjection," but which they used preferably because of the general republican feeling that subjection now relates to monarchic governments.

JUSTICE DAY: You will probably not find that term in any American discussion of the relations between the people of either the United States or its territories.

MR. COUDERT: Well, I remember that the Attorney-General at this bar stated that in his view (the view of the Government has shifted since then, perhaps owing to the decision in Downes *v.* Bidwell) these persons were American subjects; and, to use his own excellent and eloquent expression, "to be called an American subject is no disgrace," and he went on to enlarge the fact that the treaty, by transferring their allegiance, had made them subjects; but, to adopt your suggestion, perhaps it would be more proper to have called them liegemen. It made them American liegemen; but he contended that they were not citizens.

JUSTICE DAY: I prefer that term to the other.

MR. COUDERT: It is very much a question of taste, I presume; it has a flavor of poetry about it. But I want to emphasize the fact that the transfer of allegiance had some effect, and that nothing that Congress could say or could do could change that effect. If Congress legislated white men to be black men, or *vice versa,* it would not change the laws of physiology or anthropology. Congress cannot change the objective relation which exists in the mind of man between things. And there-

fore when Congress and the treaty-making power had transferred allegiance, the consequence must necessarily follow that these persons had become liegemen, nationals or subjects, all of which terms are absolutely identical as far as the law is concerned.

The view that was taken below—and I say this in answer to Mr. Justice Day's question, and then I will come back to the thread of the argument—was this: Judge Lacombe said——

JUSTICE WHITE: Pardon me; I have been trying to follow you.

MR. COUDERT: It is an effort, I know.

JUSTICE WHITE: You said you were going to give the two instances.

MR. COUDERT: I was going to give them.

JUSTICE WHITE: And you were interrupted.

MR. COUDERT: I am going to give the two instances, but I wanted to answer Mr. Justice Day first. I would like to follow the ideas of the Court, so far as that is concerned. It is indifferent to me which logical order we take up. I only hope to be able to cover it all without wearying the Court too much.

I will come back to the question of the two instances; but Judge Lacombe took the view (which points out exactly what he had in mind) that citizenship and alienage were necessarily exclusive terms, and that there was no middle category; for he argues:

Porto Ricans before the cession were Spanish subjects. (He used the word "subjects.") They were Spanish subjects, undoubtedly. Now, he says, the treaty intervenes, and expressly, by its provision as to native inhabitants, reserves their civil rights and political status to Congress. Therefore, reasoned Judge Lacombe, the condition or status of the Porto Ricans not having been changed, remains exactly the same as it was before; and having before been aliens, they are still aliens, and will remain aliens until the Government of the United States naturalizes them as citizens.

This seems to me to involve a fallacy in this, if your

Honor please: that Judge Lacombe overlooked the fact (even conceding his premises to be sound) that, excluding the naturalization clause, there may be a middle class of persons who are neither citizens nor aliens, and that the two terms are not necessarily and mutually exclusive. If that contention is sound, then Judge Lacombe's whole argument must necessarily fall to the ground.

We contend, and it is all that is really necessary for a disposition of this case, that for a third time in our history it is possible, taking what we consider to be a narrow but still a strictly logical view of the question, that subjection and citizenship are not absolutely co-extensive terms; that their orbit is not the same; that we have to-day in our law nationals or subjects who are not citizens, because their allegiance having been shifted expressly by the treaty, and there being no way of preventing that consequence, because we cannot claim that they owe any allegiance to anybody else, it is exclusive and mutual. Having shifted their allegiance, it has made them our subjects or liegemen in the sense that they are persons owing us allegiance; and if they owe allegiance to the Government of the United States, and if language as a means of human communication is of any value at all, they cannot possibly be foreigners or aliens. To contend that they are seems to us to be impossible.

The converse of that proposition came up in the Goetze case. It was held, or, rather, it was reasoned by Judge Townsend below (that was the first one of the insular cases that came to this Court) that the treaty having reserved the rights of these people, they still remained foreigners, and that as they were foreigners their country must consequently be foreign, and therefore, not within the meaning of the tariff laws.

Now that it has been held that their country has become domestic, Judge Lacombe still has gone on following in the line of thought laid down by Judge Townsend, and has held that although the country was domestic and ceased to be foreign, nevertheless the people in it were

aliens and foreigners; so that apparently the soil is American, but all its inhabitants are aliens or foreigners —a situation, I suppose, never reached before outside of comic opera; certainly never found in any legal category in any civilized country.

To come back to the suggestion made by Mr. Justice White, it is quite possible that there might be persons who were not citizens or aliens, and consequently, if they were not aliens, the immigration law would not apply; and therefore, the law not applying to them, the Commissioner would have no jurisdiction over them at all. Or, to make the illustration stronger, in many of our States an alien cannot hold real estate. Therefore, if the person is not an alien, but a United States subject, as the learned Attorney-General, Mr. Griggs, called them, then they would at least have the privilege, only denied to aliens, of holding real estate.

For instance, in the State of New York—and that illustration, it seems to me, makes it rather clear—the holding of real estate is dependent upon reciprocity. The French allow Americans to hold real estate in France; consequently in New York we allow Frenchmen to hold real estate, because reciprocity is our law. Now, if these people are aliens, as Judge Lacombe has decided, how could there possibly be any reciprocity between Porto Rico and New York? It is absurd, because we are practically all under one general national jurisdiction, and therefore, we could not look at a Porto Rican law as we look at a foreign law to see if a foreign sovereignty allows New York citizens to hold real estate in Porto Rico. Of course, citizens of New York are bound to be able to hold real estate in Porto Rico. They cannot be aliens in Porto Rico, and, therefore, the Porto Ricans cannot very well be aliens in New York, and there cannot be any reciprocity. This illustration reduces that contention to an absurdity at once.

I was speaking of the two only cases in our law in which alienage and subjection had not been identical. We have seen that at English law they were necessarily and always identical and mutually exclusive.

The framers of the Constitution did not define citizenship; and I think the evidence is that they probably assumed that citizenship was what was meant by subjection at the English law, and that they were to be determined by the same tests. That is what was decided in the case of Wong Kim Ark, the Chinese baby case. But when the Dred Scott case came to this Court, for the first time in our law—I say "in our law," because there are instances in other laws, to which I shall refer—it appeared that there was a class of persons who were not citizens, yet were not aliens.

The Constitution confers upon every citizen of the United States the right to sue in a Federal Court. Dred Scott was denied that right on the ground that he was not a citizen. But it was not contended that he was an alien. It was admitted that he was not; that he had no other allegiance. As has been said in commenting on the case of Elk *v.* Wilkins, and other cases, by members of this Court, the free negro before the war was not considered to be an alien. He was a United States national or subject, or liegeman, as you please. He owed allegiance to the Government of the United States. He was not an alien.

JUSTICE BROWN: I believe a good many of the States have half-and-half people; that is, those who have declared their intention to become citizens, but who are not entitled to vote in the national elections.

MR. COUDERT: Yes; aliens do vote in many of the States.

JUSTICE BROWN: They are aliens under the Federal law, but they are virtually citizens of the United States under the State law.

MR. COUDERT: They are State citizens.

JUSTICE BROWN: They have a half-and-half position.

MR. COUDERT: We have that strange dual conception of State citizenship and National citizenship. That question, of course, was never settled until the Fourteenth Amendment was adopted, which made State citizenship incident to National citizenship. State citizens

not United States citizens, however, are mere aliens in the eye of the Constitution and Federal laws.

I now come to the Fourteenth Amendment; and as I understand the Fourteenth Amendment, its purpose was to make subjection or nationality and citizenship identical. That amendment made all of the negroes citizens —those who had formerly been free and those who had formerly been slaves—"all persons born within the United States are citizens thereof," and so on. That expression "born within the United States and subject to the jurisdiction thereof," is the exact English equivalent of "born within the obedience of the King." So that subsequent to the Fourteenth Amendment——

JUSTICE HOLMES: It is rather curious that the Fourteenth Amendment adopted the territorial test in place of this, whereas I suppose that the later discussion and the works that I have read generally considered that parentage was the most enlightened test.

MR. COUDERT: Yes; the Fourteenth Amendment adopted *jus soli,* the English law, rather than the law of descent, the *jus sanguinis,* which seems to be more or less in vogue in continental countries.

JUSTICE HOLMES: The more fashionable view, I should say.

MR. COUDERT: It is the more fashionable view. The American view is not always fashionable, but it is getting to be more fashionable, I think, as time goes on.

But even under the régime of *jus sanguinis,* this question would remain the same. The transfer of allegiance everywhere nationalizes or naturalizes the new people, as we will see later on.

Therefore the definition contained in the Fourteenth Amendment made subjection and citizenship identical. Is it possible that subsequent to the Fourteenth Amendment there still was (and I now come to my second instance) a class of persons who were not citizens of the United States and yet were not aliens? I think that there was such a class of citizens, under the case of Elk *v.* Wilkins. It is not quite so clear as the Dred Scott

case, because it is complicated by the question of tribal allegiance; but still it is pretty clear. It is this:

An Indian had separated himself from his tribe. He had taken up the habits of civilized men, their garb and speech, and lived in one of the States of the Union. The question arose as to whether he was to be treated as a citizen or not. And though he had severed himself from his tribe and renounced his allegiance to his tribe and had no tribal allegiance (which, of course, would have made him a foreigner; if he had had a tribal allegiance he could not have been a citizen, under all the cases), it was held that, nevertheless, he was not a citizen of the United States, because he had not been naturalized as such. While he had been born within the domain of the United States, he had been born subject to another allegiance, viz., the tribal allegiance; and the Government of the United States has always treated the tribe as an entity, and the individual as owing allegiance to his tribe. That has been a legal fiction which has been consistently followed out.

What was the status of this man, separated from his tribe, owing it no allegiance, and living among us? As Mr. Justice Harlan put it in his dissenting opinion, he had been reduced to the unfortunate condition of a person who was not a foreigner and a person who was not a citizen; and we again had in our jurisprudence the unfortunate class of citizens whom we had had under the Dred Scott case. Evidently Congress took that view of the decision, the view that was stated by Mr. Justice Harlan in that case; because Congress passed an Act, within a few years, which declared that an Indian who was separated from his tribe was a United States citizen, endowed with all the rights thereof.

Those are the only instances, I will say in reply to Mr. Justice White's question, that I can think of in which allegiance and subjection have not been wholly identical, and in which we had persons who undoubtedly owed allegiance to the United States and who were not considered by the courts as United States subjects.

I ought to say right here, and I perhaps ought to have said it sooner, that the question has been complicated in this country as it probably would not be elsewhere by the fact that, with us, the word "citizenship" is constantly used in a double sense. "Citizenship" primarily, etymologically and properly means a participant in political rights and privileges; a person who, as some witty man has said, "is endowed with a homeopathically-diluted dose of sovereignty." That is the real citizen—the burgher, the person who has political rights. In its broad sense, however, it includes all members of the nation. (Minor *v.* Happersett, 21 Wall, 162.)

That has led to a great deal of misconception, because we do not claim that any of these people had political rights. Political rights are conferred, usually, by one of the States of the United States, and are totally independent of citizenship in the broader sense in which it is the equivalent of subjection. For instance, to make that quite clear, Mr. Cogordan, in his work on "Nationality," explains:

All citizens are nationals, but all nationals may not be citizens. For, he says, speaking of the French law particularly, Citizens are, first, all those who are the holders of political rights, who have a status in the State. Second, they are all persons whatsoever possessing the ordinary civil rights of Frenchmen, owing allegiance to France, such as minors, incompetents, and women. Those are the two ordinary categories of citizens. The first might be termed active citizens, and the second passive citizens. It is in that sense a passive citizenship which is equivalent to subjection.

But he goes on to say that, in addition to passive citizens, there may be and there is a third class; and this brings me to the illustrations that I want to give from the expansion or imperialism practiced in other governments, and which throws light on our peculiar and anomalous legal situation here.

He says that there are French nationals who are not French citizens in any sense; not in the sense of the

holders of political rights; not in the passive sense as women, minors and incompetents; but yet they are French subjects. He instances, for example, the Algerians, who, until recently, have been and still are, to a great extent, subject solely to their own Mussulman law and customs. These people, he says, are French subjects and French nationals, although they are not citizens. That instance shows that there may be a category of persons, and that there are categories of persons in other systems of law who owe allegiance and are subjects, are liegemen, but are not citizens.

In the case of Algeria the decisions of the French courts bring out this distinction very clearly, and seem to me to throw light on our problem, and to make the decision of the Circuit Court in this case seem wholly illogical and out of accordance with all general jurisprudence. When Algeria was annexed and permanent occupation assumed by the French, a case came up before the highest French Court, the Court of Cassation, away back in 1834. An Algerian Israelite demanded admission to the French bar and the administration refused it. They said: "Why, you are an alien; you are not a French citizen. You are an alien, and aliens cannot be admitted to the bar;" and the matter went up to the Court of Cassation.

The Court said that from the moment of the annexation, the cession of Algeria, the ending of Mussulman sovereignty in Algeria and the transfer of the sovereignty to France, the inhabitants ceased to be aliens. They did not necessarily have any political rights as French citizens, and they did not decide that they became French citizens; but they used the expression which the French Convention had objected to back in 1800 on sentimental grounds; they used the expression, *"sujets Français,"* and held them French subjects, although France is a republic.

That jurisprudence has been followed out in France in the annexation of Anam, in China. The same question arose there when Anam was annexed; and they

said that the moment that the Anamites ceased to owe any allegiance to the Emperor of China they became French subjects. They did not have, perhaps, the rights of all French passive citizens, but their allegiance being shifted, they were not under the disabilities of aliens.

Those illustrations show how other courts have treated the matter, and indicate a perfectly logical way in which they may be treated. That is to say, that at least the transfer of allegiance converted them from foreigner into something else. And whether you call that something else "subject," as the French have called it, in their jurisprudence, *"sujet Français,"* or whether you call it liegeman, which is a prettier expression, or whether you call it national, which is an international law expression, is absolutely a matter of indifference.

Therefore we have seen that the treaty having transferred the allegiance of the Porto Ricans they ceased to be foreigners under the rules of English law, under the American law, as understood at international law, as well as illustrated by the actions not only of Great Britain that we have cited, but of the French in Algeria and their other conquests. In Algeria they treated the natives perhaps more intelligently than we have treated the Indians. While the Mussulmen have always lived under their own tribal customs and have been allowed so to live, they have never been recognized as being *quasi* foreigners, as we recognize the Indians and as having had any other allegiance. They have always considered them as French subjects, but French subjects who did not have the full rights under the French law, but were subjected to their own law.

Very curious cases have arisen under this state of facts, which I have not taken the time to mention in my brief; but one of them brings out the peculiar situation and shows how it has worked out. The Israelites in Algeria were made by statute full French citizens, not subjects. They were not living in tribal relation, and they had no peculiar law of their own.

When they became French subjects they invoked against the Arab tribes the rule of the French law that where property is owned in common by anybody, no Frenchman is forced to remain tenant in common; that is, he has a right to partition. Now, the Arabs held a lot of land in common; and some shrewd Israelites purchased a share from a member of one of the Arab tribes and then brought a partition action and served them all with notices, with the blue legal notices common under the French system, which they probably used to light their pipes. Presently, however, they found that their land had been sold under a judicial decree, and great confusion arose; and finally special regulations had to be made, and the property law of the Musselmen and that of the other inhabitants of Algeria who had risen to the dignity of passive citizens had to be assimilated and reconciled, so that such cases could not come up.

So much for illustration. Therefore I cannot, I confess—and I say it with great frankness, the argument seems to me so plain that they ceased to be aliens and foreigners—see any answer to it whatsoever. Usually there are two sides to a question. Usually these questions are complicated and difficult. I have not read the Government's brief yet, having this moment received it. I rely upon the decision of Judge Lacombe as virtually setting out their contention. But I cannot see, unless words have ceased to have all their meaning, how those people can be aliens; because, after all, words must denote some definite conception. Otherwise the human voice would be a useless organ, and all systems of law would be destroyed. When a statute says "alien immigrant" it means an alien coming from a foreign country; aliens cannot owe allegiance to the United States and Porto Rico is not a foreign country.

That is enough to determine our case, as it seems to me. But if I can be borne with for a few moments longer, I would like to take up another consideration.

It seems to me that while this is perhaps enough to determine the case, that these persons really have become, despite the language of the treaty reserving their civil rights and political status to Congress, more than mere United States nationals or subjects. They are more than that. I think that they have been naturalized and become citizens.

Of course I admit that the Fourteenth Amendment provides for two cases only; both are naturalization within the United States. Whether the Fourteenth Amendment applies to Porto Rico of course I am wholly in ignorance, because whether Porto Rico is in the United States or not within the meaning of the Fourteenth Amendment is a question that we can know nothing about until this Court definitely defines that term. Future developments will have to show. Therefore the Fourteenth Amendment may not apply or affect the question at all. These people have clearly been nationalized. It is possible that they have not been naturalized. They have not been naturalized by the Fourteenth Amendment; they have not been naturalized by specific acts of Congress conferring naturalization. There is only one other method by which they can be naturalized and become citizens of the United States. That method is the collective method of naturalization by treaty. Of course if the treaty had said that they should become citizens of the United States this case would never have come to this bar.

I claim this, and claim it is the broad and proper view to take of this case, and that it wholly disposes of it.

Congress cannot change facts by reservation. The third class of persons whom I have mentioned, whom we have seen have existed in one or two instances that we are not very proud of in our law, and have existed under other systems of law, are a class of persons abhorrent to us, as Mr. Justice Harlan well expressed it in the case of Elk *v.* Wilkins. They are a class of persons who perhaps may not be under the disabilities of

alienage, but who are certainly in a most unfortunate, and I think it is fair to say, in rather a degraded position. Now, in shifting their allegiance I believe it is the intention of the jurisprudence of this Court, and I think it is the public sentiment of the country, and I think it is the intention of Congress, that allegiance and citizenship (passive citizenship), shall go together; that when their allegiance was transferred to the United States, that was a naturalization; and that by reserving the political rights and civil status of these people Congress could not prevent what seems to me to be a proper and necessary consequence of American law, viz., their becoming citizens.

Therefore there are only three views possible, I may say in conclusion, of this case. The Court may affirm the decision below, and declare native islanders born before the cession, aliens. If so, then language will cease to have any meaning. We can only bow to authority; but this is a forum of reason, and we are absolutely convinced, that this court can not take that view. It is impossible; it is absurd; it is grotesque.

What is the second view? The Court may hold that by transferring their allegiance they ceased to be aliens. It must hold that they have become United States nationals, that they were not under the disabilities of alienage under the immigration law, that they were not under the disability of alienage in the States, such as, for instance inability of holding real estate. All aliens under the Constitution have certain general rights. Probably the only right they would not have, the only right that I know of, at least, would be the right of suing in a Federal court. In the development of law jurisprudence and political science, the disabilities of alienage, so great in ancient times have been practically removed, so that as far as civil rights are concerned there are almost no distinctions in civilized countries between aliens and citizens. And even if these people should be held to be not citizens and not aliens, they will have nearly if not quite all the rights of passive citizens of the United States.

But I say that this Court must be forced, unless they desire to take a very narrow and a very technical view, to go a little farther and to say that while the treaty did reserve their civil rights and their status, it only did so so far as it was consistent with the transfer of allegiance, and that their allegiance having been transferred they were collectively naturalized by the treaty and that there are no persons under the broad dominion and sovereignty of the United States who are in the same status as the free negro before the war under the Dred Scott decision, and the similarly degraded condition of the Indian separated from his tribe, under the case of Elk *v.* Wilkins, and that all persons who owe allegiance to the United States are not subjects or even liegeman, but necessarily citizens. I trust that that is the view that this Honorable Court will take.

JUSTICE HARLAN: Mr. Coudert, have you considered the question of those words of the immigration act which say that all decisions made by the inspection officers or their assistants touching the rights of any aliens who land, when adverse to such rights, shall be final unless appeal be taken to the Superintendent of Immigration, whose action shall be subject to review by the Secretary of the Treasury?

MR. COUDERT: I have, sir, and my answer to that is that if the contention be that the Secretary of the Treasury has a right to decide whether or not they are aliens, and thus to assume jurisdiction, that you or I, sir, may be held up by the Commissioner of Immigration and sent back, and that the rights of American citizens in that case are worth nothing.

JUSTICE HARLAN: Precisely that argument was made in the case of Lem Moon Sing *v.* The United States.

MR. COUDERT: I remember that case, yes, sir.

JUSTICE HARLAN: Where a Chinaman who had been in this country went back to his home, was gone perhaps a year and returned, having a domicile here as a merchant. He claimed the right to enter the United States, and the Collector said, "No, you are not entitled to enter

the United States." He sued out a writ of *habeas corpus,* I believe, without appealing to the Secretary, and the authority of Congress to commit the determination of those questions to his executive officers without judicial interference was sustained. Have you examined that case?

MR. COUDERT: I have seen that case. I hardly think that the Court will want to extend the doctrine. As I understand it there is a little difference in this—that there the Immigration Commissioner had a right to determine certain facts as to domicile, etc., and that here the only question is absolutely a question of law as to the effect of the treaty.

JUSTICE HARLAN: Suppose the question of fact was, in relation to the Commissioner here, whether or not this person was a Porto Rican or a Spaniard, and he had to determine that fact?

MR. COUDERT: It is possible that under the doctrine in that case the Commisioner would have a right to determine those particular facts; but that, it seems to me, is going very far, the basis of his jurisdiction must be alienage.

JUSTICE HARLAN: I do not mean to say that that case controls this one; I only call your attention to it.

MR. COUDERT: I will perhaps advert to it a little more in my reply brief. I knew of it in a general way. Of course the Chinese statutes have been somewhat different and peculiar in themselves. But I conceive it impossible that where there is any question of fact whatever for the Commissioner to determine, he can determine a great principle of international law and of treaty right and finally decide that a person who claims not to be an alien, who is at least a subject, to put it most modestly, is an alien, because then his power would be as great as that of this Court, and anybody could be excluded under that doctrine. That seems to me impossible.

I thank the Court for its kind attention.

Argument of Paul Fuller, Esq., on behalf of the Petitioner-Appellant.

MR. FULLER: To take up the last proposition of my friend on the other side, if Mr. Degetau is an alien, as the commissioner from Porto Rico, whom does he represent? Does he represent aliens? If he represents aliens, what has Congress to do with aliens?

JUSTICE HARLAN: Is he a delegate or a commissioner?

MR. FULLER: A commissioner; but he has a right to appear before the Congress. He has a right to come into Congress, but he does not speak; he does not vote. He has a right to communicate to Congress, on behalf of whom? Of aliens? And has Congress anything to do with aliens, that they should require a commissioner to tell them what the needs of those aliens are?

Now, by Act of Congress as well as by treaty or cession, the nationality and allegiance of the people of Porto Rico was changed. The Act of Congress, dealing with a condition of great difficulty, endeavored to create a new body politic, and it did create a new body politic. It called that body politic "citizens of Porto Rico;" but surely they were no longer subjects of Spain. And I may say that the distinguished Senator whose name fathers that bill begged me not to believe that he fathered that distinction. He got what he could. He called them citizens of Porto Rico and added that they were entitled to the protection of the United States.

Who is the United States entitled to protect? Is it entitled to protect aliens? As against whom? As against the government of those aliens? No. It is entitled to protect its nationals, and nothing else. "Protection" and "allegiance" are correlative terms. It has the allegiance of the Porto Ricans; it owes them protection. That makes them nationals.

To come to the only distinguished utterance made on the other side that seems to be strange and alarmist, I

mean Attorney-General Cushing when he speaks of "domestic aliens"—in other words, free slaves. There is just about as much law in one as in the other. Let us see exactly what he does say, because I have a great respect for his memory.

He says, in regard to the Indian:

"The moment it comes to be seen that the Indians are *domestic subjects* of this Government, that moment it is clear to the perception that they are not the sovereign constituent ingredients of the Government."

In other words, they are not citizens, and they have no political rights, but they are domestic subjects.

He continues:

"This distinction between *citizens* proper—that is, the constituent members of the political sovereignty—and *subjects* of that sovereignty, who are not therefore citizens, is recognized in the best authorities of public law."

That is all we contend for—that recognition which Mr. Cushing says is to be found in the best authorities of public law, and which recognizes subjection, allegiance.

JUSTICE WHITE: If I understand your argument, this case does not concern itself at all with any question of any power of Congress. It concerns itself only with what is the meaning of the word "alien" in that connection?

MR. FULLER: Yes, sir; that is all, except that if Congress had attempted to do anything else, possibly it would not have had the power. But it is useless to cross the stile until we get to it, and therefore we do not discuss that. We simply say that these people are nationals.

The Attorney-General of the United States had that question put before him in a very peculiar case with which I will trouble the Court; and then, in order not to trouble you any more with oral argument, I will beg the privilege of submitting a short brief in answer to those

we only received this morning. The Attorney-General had before him the case to which Mr. Coudert referred, of Mr. Molinas, who was classed as an American artist under the tariff law. The tariff law provided that works of art which were the production of American artists residing temporarily abroad should be free from duty. Mr. Molinas was in France when the little revolution or war occurred by which his allegiance was transferred. He arrived at New York with his paintings, and he said: "I am an American artist." "Where were you born?" "In Porto Rico." "Have you been naturalized?" "No." "Were you in Porto Rico at the time the treaty was made?" "No; I was in Paris temporarily, but I was a resident and an inhabitant of Porto Rico."

The matter was finally referred to the Secretary of the Treasury, who asked for the opinion of the Attorney-General; and the opinion of the Attorney-General was to this effect: "This man is an American artist." He cannot be an American artist without being an American, and he cannot be an American and an alien. He goes on to say even supposing that a native Porto Rican has been unintentionally omitted from Section VII, "he is undoubtedly one of those turned over to the United States by Article IX of the treaty to belong to our nationality. He is also clearly a Porto Rican. As his country became a domestic country and ceased to be a foreign country within the meaning of the Tariff Act above referred to, and has now been fully organized as a country of the United States,—it seems to me that he has become an American, notwithstanding such supposed omission."

I do not like to pit the Attorney-General against the Solicitor-General, because they are both good friends. But that is the administrative view. I trust it will be the judicial view. You will find nothing in this brief, which I have carefully read in the last hour as I have had the opportunity, to discountenance that theory.

I am very happy to be here in a case where I have no comments to make on the dissent in this Court and am

not subject to the misinterpretation from which I suffered this morning.

THE CHIEF JUSTICE: We will hear you Monday morning, Mr. Degetau.

The Court thereupon adjourned until Monday, December 7th, 1903, at 12 o'clock M.

2089

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 225.

ISABELLA GONZALES, *Appellant,*

vs.

WILLIAM WILLIAMS, UNITED STATES COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK, *Appellee.*

Brief filed by leave of the Court by

FEDERICO DEGETAU,
Resident Commissioner from Porto Rico,
as Amicus Curiæ.

STATEMENT OF THE CASE.

This is an action instituted in the United States Circuit Court for the Southern District of New York, by Isabella Gonzalez, a citizen of Porto Rico, arriving at the port of New York from said Territory on August 24, 1902, who was detained at Ellis Island Immigrant Station, examined by a Board of Special Inquiry, and prevented from landing upon the ground that she was liable to become a public charge. Said citizen of Porto Rico sued out a writ of *habeas corpus* before the United States Circuit Court for the Southern District of New York. The writ was dismissed and an appeal was taken from said dismissal to this Honorable Court.

The action of the Immigration authorities of the port of New York was taken in compliance with the provisions of a circular issued by the Treasury Department, under date of August 2, 1902, advising that:

"The provisions of the laws regulating immigration including those which prescribe payment of the head tax, apply to the residents and natives of Porto Rico." * * *

Prior to the issue of that circular, Porto Rican laborers coming to work in tobacco factories of the mainland have landed in New York without being subjected to the restrictions of the immigration laws. The only case of which I have had any knowledge in which a Porto Rican was prevented from landing at said port, previously to the date of that circular, was that of Professor Gomez Stanley, who came from France and was temporarily detained at Ellis Island. To this I respectfully called the attention of the Executive Branch of the Government. The position

taken by the State Department at that time seemed to end satisfactorily this kind of difficulty. That Department in a communication dated February 16, 1901, referring to the statement of Mr. Gage, then Secretary of the Treasury, assured me that:

"The error of holding him, even temporarily evidently arose from the lack of knowledge of some officers as to the status of the Porto Ricans, there having been no judicial decision in the question."

But in view of the subsequent issuance of said circular I submitted on August 30th, of the same year, to the Hon. Secretary of State, and, by his suggestion, on October 5th, to the Hon. Secretary of the Treasury, a protest against said circular, because its provisions are in my opinion inconsistent with the Constitution of the United States and with the laws of Porto Rico, which, as Resident Commissioner elected by the qualified voters of said Territory, as provided for in Section 39, of the Act approved on April 12, 1900, before entering upon the duties of said office, I took an oath to support. This oath was taken in compliance with Section 16, of said Act which provides, that:

"All officials authorized by this Act shall, before entering upon the duties of their respective offices, take an oath to support the Constitution of the United States and the laws of Porto Rico."

The Treasury Department answered me under date of October 15, 1902, as follows:

"Without going into a discussion of the points raised by you in objection thereto, it seems sufficient to direct your attention to the judicial finding of Judge Lacombe of the United States Circuit Court for the Southern District of New York."

Acting upon the suggestion of the Treasury Department, I have carefully studied the decision of the learned judge, and found that his opinion according to my best knowledge, is in open opposition to the Constitution and the laws that I have sworn to support. Hence my motion to file this brief as *amicus curiæ* to this honorable Court.

BRIEF OF THE ARGUMENT.

First Point.

To state that a person is "a native of Porto Rico" in order to decide whether said person is a citizen of the United States, is inconsistent with Sec. 7 of the Act of April 12, 1900, that declares *all* inhabitants of the Island continuing to reside therein to be citizens of Porto Rico with the sole exception of those who elected to preserve their allegiance to the Crown of Spain.

Second Point.

In the enforcement of the immigration laws against a native of the territory of Porto Rico coming from any port of said territory to any port in the mainland, the proposition that, "the only question open for discussion * * * is whether said person is an alien," is inconsistent with the provision of the immigration laws enforced, which requires the passenger to whom they apply to be not a citizen of the United States *and to come from a foreign port.*

Third Point.

To quote the definition of citzenship in the Fourteenth Amendment to the Constitution omitting the phrase relating to State citizenship, is to deprive the Constitutional definition of one of its essential characteristics. The quotation

thus made is not only incomplete but also misleading in its bearing upon the case under consideration. The amendment quoted does not require the territory in which a person is born to be United States territory *at the time of his birth*. It is therefore inconsistent with the constitutional prescription to deny national citizenship to a person born in the United States, subject to its jurisdiction and declared to be a citizen of said United States territory on the ground that said territory was not United States territory at the time of his or her birth.

Fourth Point.

The syllogism that a person "was by birth an alien, and that unless she has been naturalized she is still an alien" as applied to the present case constitutes a case of *fallaciæ dictionis* on account of the unrestricted meaning of the verb *was* embracing two quite different legal questions. So far as this verb refers to the time since the territory of Porto Rico became a territory of the United States, the first premise is a *petitio principii* because what it assumes is identical with the conclusion to be proved. In such case the suggestion that said person can be naturalized under the laws prescribed by Congress regulating the admission of aliens to citizenship is juridically and legally inadmissible.

It is juridically inadmissible because to be naturalized means to become as a native of the territory of a given country through a legal formula, and the natives of a territory of the United States cannot have recourse to a legal remedy in order to become what they are already by the operation of the laws of nature.

It is legally inadmissible because the naturalization laws require the renunciation of the allegiance due by the applicant at that time to "any foreign prince, potentate,

state * * *" The citizens of Porto Rico owe national allegiance only to the Constitution and the statutory laws of the United States (Sections 16 and 14 of the Act of April 12, 1900), and cannot be asked, therefore, to renounce such foreign allegiance, which they have already renounced forever.

Fifth Point.

The statement that the treaty of Paris, unlike earlier treaties, *did not undertake* to make the native inhabitants of Porto Rico citizens of the United States, is not exactly accurate. So far as it assumes on the part of the framers of the treaty the purpose of depriving said inhabitants of their national citizenship, it is contradicted by the form in which their status was changed by the United States Government before the article about citizenship was stipulated. Said assumption is inconsistent also with the explicit purpose of the suggestion made by the President of the United States to the Peace Commissioners, in the matter of citizenship, and by the solemn declarations of said Peace Commissioners upon the article of the treaty on the nationality of the inhabitants of the ceded territories.

Sixth Point.

The quotation of paragraph second only, of Art. IX of the Treaty of Paris, to reach a judicial interpretation of Sec. 7 of the Foraker Act, constitutes an incomplete quotation to conclude that this legislation has not operated to effect a naturalization of the native inhabitants of the territory of Porto Rico as citizens of the United States.

Seventh Point.

The conclusion that a native of Porto Rico, "being foreign born and not naturalized, remains an alien," when applied to a citizen of said territory is inconsistent with Sec. 7 of

the Act of April 12, 1900, with other sections of the same Act, and with the statutory laws of the United States, and with the provisions of the Fourteenth Amendment to the Constitution in regard to the right to the equal protection of the laws guaranteed by said Amendment to any person under the jurisdiction of the United States.

First Point.

The decision stating the facts on which all its reasoning is based, affirms that:

"The petitioner, * * * is a native of Porto Rico."

Section 7 of the Act of April 12, 1900, applied by the Circuit Court to the decision of the case, provides:

"That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Porto Rico, * * * shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain, * * * and they, together with such citizens of the United States as may reside in Porto Rico shall constitute a body politic under the name of the people of Porto Rico."

All inhabitants of Porto Rico, whether natives of the Island or born in any foreign country, or in the United States, who had become Spanish subjects, and were Spanish subjects on the eleventh day of April, 1899, are declared to be citizens of Porto Rico, with the sole exception of those who preserved their allegiance to the Crown of Spain, and *are incorporated in one body politic with those who were already American citizens.*

Assuming that the petitioner is a citizen of Porto Rico as

I understand her to be, the opinion establishes an unwarranted discrimination in stating that the petitioner "is a native of Porto Rico." Such discrimination is unwarranted so far as Section 7 of the Act of April 12, 1900, is concerned, because the law does not make any distinction between the inhabitants.

This statement of facts appears also to be misleading. It directs the attention to the inquiry whether a *native* of Porto Rico is a citizen of the United States, diverting the discussion from the real legal question raised by the Circuit Court decision which is in my judgment, whether "a *citizen* of Porto Rico is a citizen of the United States."

Second Point.

After having thus stated the facts, the decision of the United States Circuit Court enounces the legal proposition to be discussed in the following words: "The only question open for discussion on this application is whether or not the petitioner is an alien."

In my opinion this statement constitutes another error because the Immigration Laws enforced in the case under consideration apply to passengers who are not citizens of the United States *and who come from a foreign port.*

Section 1 of said Act entitled "An Act to regulate immigration," approved August 3, 1882, provides:

"That there shall be levied, collected and paid, a duty of fifty cents for each and every passenger not a citizen of the United States who shall come * * * *from a foreign port to any port within the United States.*"

Section second of the same Act, in reference to the question involved, declares:

"And * * * if there shall be found among *such passengers,* * * * any person unable to take care of himself or herself

without becoming a public charge, * * * said person shall not be permitted to land."

The law requires therefore in such a passenger two essential conditions in order to subject him to its restrictions.

First—That such passenger shall not be a citizen of the United States.

Second—That such passenger shall come "from a foreign port to any port within the United States."

Not one, but two questions are, therefore, in my opinion open to discussion in the case of Isabella Gonzalez.

First, whether the petitioner is not a citizen of the United States; and,

Second—Whether any port of the Territory of Porto Rico can be considered "a foreign port" for the purposes of the Immigration Laws.

In relation to this second point, I maintain that no port of the Territory of Porto Rico can be considered as a "foreign port" for the purposes of the Immigration Laws; and that, even if the petitioner were an alien—which I deny—the provisions of the Immigration Laws should not apply to her.

The opinion of this Honorable Court rendered by Justice Brown in De Lima v. Bidwell, after reviewing previous decisions, and studying the precedents of the annexation of other Territories of the United States, to wit, Louisiana, Florida, Texas, California and Alaska, concludes:

"It follows from this that, by the ratification of the Treaty of Paris the Island became territory of the United States—although not an organized territory in the technical sense of the word."

Analyzing the theory that a country may be domestic for one purpose and foreign for another, the opinion quoted plainly declared that:

"We are unable to acquiesce in this assumption that a

territory may be at the same time both foreign and domestic."

The reasoning of the opinion leads this Honorable Court to declare that:

"Porto Rico was not a foreign country, * * * but a territory of the United States."

In Downes *v.* Bidwell, the opinion maintained the same doctrine, deciding that:

"We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States."

It is beyond my comprehension how the ports of a territory that is "not a foreign country, but a territory of the United States," can be considered as "foreign ports."

In favor of my opinion I would quote decisions of the Departments of Justice and of the Treasury.

These very Immigration Laws were already in force in August, 1902, in the ports of Porto Rico against each and every passenger not a citizen of the United States, who arrived there "from a foreign port." A few months before, the question was raised whether the money collected in Porto Rico from the head tax on alien passengers brought into ports of that territory, should be accounted for and credited to the "immigrant fund" as is done with like collections upon alien passengers arriving at ports of the mainland. The question was decided in the affirmative by the Department of Justice. The decision rendered on July 15, 1902, reads as follows:

"Among the statutory laws of the United States 'given force and effect in Porto Rico' by said act (the Porto Rican act) is 'an act to regulate immigration' (22 Stat., 214), approved August 3, 1882. * * * The act provides that

this duty shall be paid the collector of customs of the port to which such passenger shall come, * * * and that, 'the money thus collected shall be paid into the United States Treasury, and shall constitute a fund to be called the immigrant fund, and shall be used, * * * for the care of immigrants arriving *in the United States*, * * * *Provided*, That no greater sum shall be expended for the purposes hereinbefore mentioned at any port than shall have been collected at such port.'

"If section 14 of the Porto Rican Act really gives 'force and effect' to said Immigration Act in Porto Rico, the money collected thereunder must be paid into the United States Treasury, and devoted to the purposes designated in said Act. Unless this is done, the purpose of the Act is clearly defeated.

"If this is done the spirit of Section 4 will be carried out as well as the letter of Section 14, for the money collected in Porto Rico under said Immigration Act will undoubtedly all be expended *at the various ports in Porto Rico* where it shall have been collected, and Porto Rico receive the benefit thereof." (Opinions, Attorney General, Vol. 24, pages 87-88.)

According, therefore, to the doctrine maintained in this decision the words "United States" as used in the law, mean the territory of Porto Rico, and the ports of said Territory are "ports in the United States."

The same theory has been affirmed by the Treasury Department in the case of an alien, Hans Carlson, a native of Norway, who arrived at the port of Boston, Mass., coming from Ponce, Porto Rico. In the decision rendered April 22, 1903, the Hon. F. A. Reeve, Acting Solicitor of the Treasury Department, held that:

"An alien passenger coming from a port of Porto Rico to a port of the United States proper, is not a person coming from a foreign port." In the opinion of the Solicitor, the Department concurs. (Treasury Department Decisions, Vol. 6, Thursday, April 30, 1903, page 18.)

As the status of the Territory of Porto Rico has not been declared changed by any law of Congress, nor any opinion of this Honorable Court in the period of time embraced between August 24, 1902, when Isabella Gonzalez landed, and April 22, 1903, it may be properly inferred that also in the opinion of the Treasury Department the ports of Porto Rico were no more "foreign ports" at the first date than at the second.

The action therefore of the Immigration authorities in applying to passengers coming from the ports of Porto Rico to the ports of the mainland, the restrictions of the Immigration Laws as if they came from a foreign port, is unwarranted by the Immigration Laws of the United States even in case such passengers should be aliens.

Although not applicable to the case decided by the Circuit Court, because subsequently enacted, the law entitled "An Act to Regulate Immigration of Aliens into the United States," approved March 3, 1903, expressly maintains the same principle covering these cases. Section 2 of this act provides:

"That the following classes of aliens shall be excluded from admission *into the United States*" (here follows the enumeration of the classes of aliens excluded.)

Section 33 of the same act reads as follows:

"That for the purposes of this act the words 'United States' as used in the title as well as in the various sections of this act shall be construed to mean the United States and any waters, territory or other place now subject to the jurisdiction thereof."

The Circuit Court therefore erred when affirming that the only question open for discussion is whether or not the petitioner is an alien.

Third Point.

The opinion begins to lay the foundation of its theory by stating that:

"The Fourteenth Amendment to the Constitution provides that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

Assuming this quotation to be exact, for the purposes of the discussion, the theory that the native-born Porto Ricans are "aliens", might be maintained on the ground that they have been expressly declared by the Act of April 12, 1900, to be "citizens of Porto Rico", and therefore this citizenship necessarily excludes all possibility of the same persons being at the same time citizens of the United States.

This reasoning, however, would be defective on two fundamental points:

First, because it would imply the theory that a nation has jurisdiction to establish the status and to require allegiance to its own constitution and laws, not only of its own citizens, but of the citizens of other countries; that is, of aliens, against elementary conceptions of international law.

And, second, because it would imply that the citizens of the United States who reside in Porto Rico forming part of that *body politic*, "The People of Porto Rico" created by Section 7 of the Act of April 12, 1900, have been deprived by Congress of their United States citizenship. This last assumption is inadmissible because it is inconsistent with Article XIV of the Constitution, which prohibits the enactment or enforcement of "any law which shall abridge the privileges and immunities of citizens of the United States."

But I will not analyze further this hypothesis because the quotation of the Circuit Court is not exact; and it is not exact because it is incomplete.

The Fourteenth Amendment to the Constitution reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States *and of the State wherein they reside.*"

The opinion of the Circuit Court, by omitting the words here printed in italics, deprives the definition of citizenship of an essential characteristic of our constitutional system. The constitutional prescription establishes a double allegiance, a double citizenship; local and National. The citizen of a State or Territory of the American Union owes allegiance to the laws of the Commonwealth wherein he resides and to the Constitution and laws of the United States.

The same double allegiance has been required from the Porto Rican citizens by Article 16 of the Act of April 12, 1900, before quoted, when it provides that they will take an oath to support the Constitution (National allegiance) and the laws of Porto Rico (local allegiance). Article 14 of the same act completes the National allegiance required from them by declaring the statutory laws of the United States in force and effect in that Territory with the sole exception of the internal revenue laws.

Furthermore the Fourteenth Amendment does not require the Territory in which the person is born to be United States territory *at the time of his or her birth.* It is therefore inconsistent with said Amendment to deny to a person born in the United States, subject to its jurisdiction and declared by Congress to be a citizen of a United States territory, his or her National citizenship on the ground that said territory was not United States territory at the time of his or her birth.

The quotation of the Fourteenth Amendment of the Constitution as it appears in the decision of the Circuit Court

is therefore incomplete and misleading in its bearing upon the case under consideration.

Fourth Point.

On that foundation the theory of the opinion is opened with the following syllogism:

"It is not disputed that the petitioner was by birth an alien; unless in some appropriate way she has since been naturalized, she is still an alien."

In the first premise of this syllogism the opinion commits the error that Aristotle called *fallaciæ dictionis*, because by the use of the verb *was* two completely different legal propositions may be expressed:

First, the verb *was* may refer to the time when Porto Rico was a province of Spain and the petitioner clothed with Spanish citizenship. Then the first premise ought to be understood as saying: "It is not disputed that the petitioner was *at the time* of her birth an alien." The statement is exact and not open to question. Then she could have been naturalized and the logical conclusion is that unless she had been naturalized, she was still an alien at the time of the transfer of sovereignty of the Territory of Porto Rico. But in such case the point does not appear pertinent to the decision of the case.

Second, the verb *was* of the first premise may refer to the time of the petitioner's detention at Ellis Island, when Porto Rico had ceased to be a province of Spain, had become territory of the United States, and its inhabitants subject to the jurisdiction thereof. Or in other words, the verb *was* refers to the *present status* of the petitioner. Then the first premise signifies that: "It is not disputed that the

petitioner *is* by birth (on account of the nationality of the territory in which she is born) an alien." This seems to be the intended meaning of the phrase. But in such case the statement, as a statement, is erroneous on its face, because the legal question discussed by the opinion, is whether on account of being a native of Porto Rico, she is or is not an alien. As a syllogism the proposition constitutes a clear case of *petitio principii*. What the opinion assumes in the first premise is identical with the conclusion to be proved, and the error of logic consists in the fact that the Circuit Court seems not to be aware of it.

The opinion persists in the error of confounding the status of the petitioner while Porto Rico was a Province of Spain and she a Spanish citizen, with her status after the transfer of sovereignty, when amplifying the second premise of the syllogism it adds that:

"There is no suggestion that she was ever naturalized under the general laws prescribed by Congress regulating the admission of aliens to citizenship."

As the word *ever* is not limited in its meaning, it can refer to any time during the life of the petitioner, and the same ambiguity as before results. If we assume that this *ever* means while the petitioner was a Spanish citizen, the proposition that she could be naturalized is as before noted a perfectly admissible one. But the opinion seems rather to refer to the period of time included between the transfer of sovereignty of Porto Rico and the arrival of the petitioner at New York. It can almost be affirmed—in consideration of the pertinence of the question to the case—that this is the meaning of the statement. In such case the action on the part of the petitioner that the opinion refers to, her

naturalization under the statutory laws, is juridically and legally inadmissible.

In order to see the juridical inadmissibility of the proposition it is enough to observe that to be naturalized means to become, through a legal formality, "as a native" of the territory of a given nation. The petitioner, because she is born in a given territory of the United States, cannot, since that territory is United States territory, have recourse to a legal fiction, to become what she already is by operation of the laws of nature.

And to observe the legal inadmissibility of the proposition stated in the opinion, it will suffice to read the naturalization laws.

These laws, in order to admit an alien as a citizen require that he renounce "forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereign of which the alien may be *at the time* a citizen or subject." (Revised Statutes of the United States, Section 2165.)

At the time comprehended between the transfer of sovereignty of the Territory of Porto Rico and the arrival of the petitioner at New York, she was not a subject of any foreign prince, potentate, state or sovereignty. According to the Porto Rican Act, as we have already seen, the Porto Rican natives with the other citizens of that territory owe allegiance and fidelity to the Constitution of the United States, and the laws of Porto Rico (Section 16) and to the Statutory Laws of the United States (Section 14). The theory that a person can renounce forever the allegiance to the United States to become a citizen of the United States appears clearly inadmissible. The naturalization laws, intended for aliens, cannot therefore apply to the native citizens of Porto Rico.

Fifth Point.

The opinion of the Circuit Court states:

"The Treaty of Paris, unlike earlier treaties which dealt with the Louisiana and Florida purchases, with California and with *Alaska, did not undertake to make the native born inhabitants of* Porto Rico citizens of the United States."

This statement is misleading and not exactly accurate. The error seems to proceed from a misconstruction of a *dictum* of this Court, when in Downes *vs.* Bidwell reference was made to previous treaties in order to demonstrate the inacceptability of the theory that the inhabitants of a ceded territory could become, immediately upon annexation, whether savage or civilized, clothed with the rights, privileges and immunities of citizens of the United States. This reference to the previous treaties is in my judgment perfectly logical.

But the provisions relating to citizenship referred to in the Circuit Court's decision, are not identical in the several treaties and cannot, therefore, form a congruent term of comparison. In the case of Louisiana, the treaty provides for the admission of the inhabitants "to the enjoyment of all the rights and immunities of citizens of the United States," without making any distinction among them. In the case of California, the treaty leaves to the Mexicans the privilege of retaining their former allegiance, those who do not exercise it being considered as e cting the new nationality in like manner as is stipulated in the Treaty of Paris for the citizens of Porto Rico, natives of the Spanish Peninsula; and, in the case of Alaska, distinction is made between "the inhabitants" for whom a similar provision is made, and the "uncivilized native tribes," who will be subject "to such laws and regulations as the United States may adopt."

We shall see later that the provisions of this last treaty served as a precedent for the provision of the Treaty of Paris relating to citizenship contrary to what seems to be understood by the opinion.

The comparison thus made appears even less justified by the juridical position of the inhabitants of the Territories with relation to the United States, at the time in which the earlier treaties were concluded, and that of the inhabitants of Porto Rico when the article under consideration was framed.

A brief consideration of the status of the latter when the article of the Treaty of Paris was drawn, and the plain declaration of its authors, will evidence that the purpose attributed to them by the opinion is erroneously assumed.

Status of Porto Rico and Its Inhabitants Previous to the Transfer of Sovereignty.

By the laws of the Indies, Porto Rico, as the other Spanish-American countries, was "incorporated into our Royal Crown of Castille"—as the King said—Law I, Title I, Book III, of the Laws of Indies. (Ley 1ra. Titulo 1ro. Libro 3 de las Leyes de Indias.)

In the application of this principle, so early as in 1511, the privilege was granted to Porto Rico to send representatives to the Court of Spain. (Procuradores en Corte.) Royal Order of the Queen Doña Ana, of the 26th of February, 1511.

By the Royal Decree dated November 24, 1698, the Porto Ricans, like other Spanish Americans, were declared to be entitled "to the same honors and prerogatives as the native-born in Castille, as has been the practice without discussion, they having obtained all kinds of positions and dignities." (Zamora y Coronado, "Legislación Ultramarina," Tomo I, p. 255–257.)

When the Supreme Central Board, governing Spain, opened the constitutional and parliamentary period, convoking the first Constitutional Convention, it issued orders on January 22, 1809, convening the representation of Porto Rico, on the ground, according to the language of the law, that the Spanish dominions in the West Indies, "are not properly *colonies* * * * as those of other nations, *but an essential and integral part of* the Spanish Monarchy." (The italics are mine.) (Zamora y Coronado, "Legislación Ultramarina," Tomo 1ro, pag. 257.)

Porto Rico was represented in that Constitutional Convention by one of her sons, Ramón Power, who was chosen by that illustrious body as its Vice-President. Article First of the Constitution of 1812, promulgated by the Cortes, defined the Spanish Nation as " the reunion of the Spaniards of both hemispheres."

The Decree of the same Cortes, dated in the Island of León (Cadiz) on the 9th of February, 1811, declares the Spanish Americans to have a complete equality of rights with the Spaniards of the Peninsula. (Legislación Ultramarina, *Ibid*)

The doctrine and the precedent settled in 1809 were afterwards followed in every one of the Constitutional periods of Spain. The Constitutional guarantees were in force in Porto Rico whenever the Spanish Península enjoyed them, and representatives were sent by the Island to the National Congress, with the sole exception of the period from 1837 to 1868, in which the Islands were unjustly deprived of their legal share in the national sovereignty. The revolution of Spain in 1868 ended that period and the representation of Porto Rico was again convened to the Cortes of 1869. On August 6, 1873, the Cortes extended to Porto Rico Title I of the Constitution. The preamble of the Law explains this action as follows:

" Whereas the present political situation of the Spanish

Nation is based on the principles of Democracy whose first tenet is that of the natural rights of men anterior and superior to all positive law;

"Whereas, these rights are affirmed in Title I of the Constitution of 1869;

"Whereas the succeeding titles refer to the organization of public powers which matter the present Cortes is specially called to consider and finally settle;

"Whereas the culture of the inhabitants of the Island of Porto Rico in itself should be sufficient, if other reasons of right did not exist, to proclaim in that Island all the liberties required by civilized countries;

"Whereas the Governor of that Island has deemed that the conditions there demanded the proclamation of freedom of the press and the right of the people to assemble in reunions and associations and has administratively promulgated these measures;

"Whereas these measures, like the abolition of slavery, had fully produced the most desirable effects;

"Whereas reasons of justice united to those of convenience, make it impossible to postpone for a single moment, on any pretext, the declaration and explicit acknowledgment of the inherent rights of the human personality in the enlightened, peaceful and loyal island of Porto Rico * * *." (Translated from "La Isla de Puerto Rico, Bosquejo Histórico," por Don J. G. Gomez y Don A. S. Burin, pp. 106–107, Madrid, 1891.)

The number of Representatives of the island in the National Congress increased from eleven in 1869 to sixteen members of the House (Congreso de los Diputados) and four Senators in the Senate (Senado), at the last election held in March, 1898. The last Spanish constitution of 1876 was also extended to Porto Rico. The Government of Spain, enabled by its Article 81, promulgated in Porto Rico the "Constitution Establishing Self Government" in the Island, by Royal Decree of November 25, 1897, a translation of which has been published by the War Department (1899).

Even after the cession of Porto Rico to the United States, the legal doctrine affirmed in the legislation above quoted has been applied by Spain to the natives of Porto Rico who inhabit the Spanish Peninsula. Thus, among other cases, while it was discussed here whether or not the Civil Service laws were applicable to citizens of Porto Rico (a question decided in the affirmative by the Civil Service Commission), Spain has not found any legal obstacle in appointing native Porto Ricans to her public offices, as in the case of Mr. Wals y Merino, now in her diplomatic service and in her embassy at Washington (Diplomatic List, Department of State, February, 1903, p. 12); while it was doubted whether or not the citizens of Porto Rico could enjoy the privilege of being admitted as cadets at West Point and Annapolis (a question decided also in the affirmative by Congress in its last session), Spain has not found any legal obstacle in having many native Porto Ricans appointed among the officers of her army, as in the case of the present military Governor of the Province of Granada, General Manuel Nario y Guillermety (Guia Oficial de España, 1902 p. 392); while the right to vote is denied to Porto Ricans residing in Illinois and the Hawaiian Islands, and accorded to them in Baltimore, Md., in Spain there is no legal obstacle to elect them as Senators to the Spanish Senate, as in the case of Mr. Garcia Molinas, the Porto Rican native who is at present a Senator from the Province of Zamora. (Guia Oficial de España, 1902, p. 67) and in the more remarkable case of Mr. Enrique Gonzalez, another native Porto Rican recently elected Senator by the Province of Zaragoza, who was an inhabitant residing in Porto Rico on the eleventh day of April, 1899.

Perhaps a misinterpretation of these facts, and especially the idea that the Porto Ricans have as yet only a Resident Commissioner in the United States, may give the erroneous

impression that the status of the native-born Porto Ricans has remained unchanged. To this be it observed that in the last days of the 57th Congress the House of Representatives approved by a unanimous vote a bill giving to Porto Rico a Delegate on its floor, as unanimously recommended by its Committee on Insular Affairs. (Congressional Record, March 2, 1903.)

How This Status Was Changed.

(a) *Under the Military Government of the United States.*

In July, 1898, the military forces of the United States invaded the island of Porto Rico, acting under the authority conferred on the Executive by the Constitution.

On the 28th of that month, General Miles issued a proclamation declaring that the military forces of the United States had come "to occupy the island of Porto Rico", bringing to the inhabitants "the fostering arm of a nation of free people, whose greatest power is in justice and humanity to all those living within its fold. Hence, *the first effect of this occupation will be the immediate release from your former political relations*". This declaration was followed by the assurance that in exchange for those former political relations the United States army came to "bestow upon" the people of Porto Rico "the immunities and blessings of the liberal institutions of our Government." (Annual Reports of the War Dep., Part 3, Rep. of the Mil. Gov. of P. R. on Civil Affairs, Wash., 1902, p. 19.)

The Porto Rican people accepted with transports of joy those declarations. Their leaders had long before explained to them that the institutions of the United States constituted the highest achievement in the organization of liberty and the sovereignty of the people. And their leaders knew well those "liberal institutions"; they em-

bodied their political ideals, and on account of their love for such ideals they had incurred the hostility of the former government and suffered persecutions, especially during the period in which the people of the island were deprived of Constitutional guarantees (1837–1868) (Spanish Official Documents quoted by A. Acosta Quintero in his book, "José J. Acosta y su tiempo", Vol. I, pp. 320 and 327. "The Political Status of Porto Rico", by F. Degetau p. 12).

The invading army thus obtained the unanimous welcome, the moral support and the earnest co-operation of the Porto Ricans.

The proclamation of General Miles will remain as a lesson of military acuteness, teaching that to conquer does not always mean to kill and to destroy. He understood well the superior moral incentives that would appeal to the public spirit in the Island, and trusted the outcome of his enterprise to the influence of ideas. His success was due not to the almost silent mouths of cannon, but to the prestige of the fathers of this Republic, the glorious framers of its institutions.

"The cheerful acceptance of the Government of the United States" asked by the proclamation of General Miles was so indisputable, that the transfer of sovereignty was morally an accomplished fact when, a few days afterwards, the Government of the United States required from Spain as one of the conditions for the suspension of hostilities, the cession of the Island (Foreign Relations of the United States, 1898, p. 821).

The acceptance by Spain of these conditions made in the message of the Spanish Government of August 7th was not considered sufficient by the United States Government (For. Rel., 1898, pp. 823, 824), and the transfer of sovereignty over the Island was stipulated in Article 2 of the

Protocol signed at Washington on August 12, 1898, as follows:

"Spain will cede to the United States the Island of Porto Rico and other Islands now under the Spanish Sovereignty in the West Indies."

In pursuance of this agreement commissions were appointed by the Government of the United States to superintend the evacuation of Porto Rico and to negotiate the treaty of peace. We shall consider later the work of this last commission so far as the question under discussion is concerned. The commission for the evacuation of Porto Rico, formed by Major General Brooke, Rear Admiral Schley and Brigadier General Gordon, received the following instruction from the President of the United States:

"You will bear in mind that Porto Rico and the other islands mentioned, except Cuba, *are to become territory of the United States*" ("Foreign Relations of the United States, 1898," p. 911.)

The evacuation took place on the 18th of October of the same year. Major General Brooke, acting as Military Governor, in accordance with the instructions before quoted, issued on the same date his General Order, Number 1, in which the transfer of sovereinty was confirmed as follows: "The cession of Porto Rico with its adjacent islands to the United States, has severed the political relations of the inhabitants thereof with the Kingdom of Spain." By the same order the administration of the laws was entrusted to "the judges and all other officials connected with the administration of justice who accept allegiance to the United States," and the same allegiance was also required in the execution of the "provincial and municipal laws from the local constabulary and police." (Report of Brigadier General Davis, 1899, Wash., 1900, p. 89.) In the enforcement of this order, allegiance to

the United States was required by the military government from all persons in any way connected with the administration.

This allegiance was not certainly the "honest submission" that was asked by the American Government of the inhabitants in the case of Cuba, "to receive the reward of its support and protection" (General Order No. 101, July 13, 1898, President McKinley to the Secretary of War,) nor the "absolute and unconditional loyalty to the United States" that was to be required of the natives of the Philippine Islands to be appointed for civil officers according to the instructions of President McKinley to the Philippine Commission (Public Laws and Resolutions passed by the U. S. Phil. Com., War Dep., Wash., 1901, p. 8). In the case of the Islands in the far East the oath administered by the Government is to the effect that the Filipino "recognizes and accepts the supreme authority of the United States of America" and declares that he "will maintain allegiance *to that nation*" as exercising there that supreme authority (Public Laws and Resolutions passed by the U. S. Phil. Com., p. 429).

In the case of Porto Rico the oath required from the inhabitants during the military government was a plain renunciation of all foreign allegiance and an explicit acceptance of the duties of American citizenship, as may be seen by the following certificate:

"SUPREME COURT OF PORTO RICO.
ISLAND OF PORTO RICO.

"I, Antonio F. Castro, Secretary of this Supreme Court of Porto Rico, upon application duly made by the Honorable Federico Degetau now Resident Commissioner of Porto Rico to the United States of America, do hereby certify that, in compliance with certain military orders, decrees or directions, and during said military government, the said

Federico Degetau, as Attorney at Law, took an oath before the Supreme Court of Porto Rico, as then constituted, renouncing forever all allegiance to any prince or potentate, or foreign sovereignty and particularly that of the government and sovereignty of Spain. And that he will support and defend the Constitution of the United States against all enemies home or foreign and he will adhere thereto with fidelity and submission and that he took said oath freely and without reservation or purpose of evasion.

"Witness my hand and the seal of the Supreme Court, on this 25th day of November, 1902.

(Signed) ANTONIO F. CASTRO, Secretary of the Supreme Court of Porto Rico."

In pursuance of the same policy the native Porto Rican Judges were authorized to administer oaths of allegiance to aliens. A list of 1,100 aliens who declared before them their intention to become American citizens, appears on page 115 of Governor Allen's Report (Washington, 1901).

In that way was our status changed under the American military government.

Section 8 of the Porto Rican Act confirms the legal force of the military orders when it declares that the laws and ordinances of Porto Rico "shall continue in full force and effect, * * * except as altered or modified by military orders and decrees in force when this Act shall take effect."

(*b*) *Under the Provisions of the Treaty of Paris.*

The transfer of sovereignty, that changed the status of the Territory and of its inhabitants under the military government of the United States, was, therefore, an accomplished fact, when some months later the American and Spanish commissioners held in Paris the conferences in which the agreement of both nations stipulated in the protocol of Au-

gust 12, 1898, was confirmed as recommended by President McKinley. (Instructions to the Peace Commissioners, September 16, 1898. "Foreign Relations, 1898," p. 906.)

Article II of the protocol was literally reproduced, forming Article II of the treaty, which provides that:

"Spain cedes to the United States the Island of Porto Rico, and other islands now under Spanish sovereignty in the West Indies."

Spain did not abandon her sovereignty in Porto Rico. She did not even relinquish it. She confirmed the transfer of sovereignty already accomplished under the military government and agreed to by a former diplomatic transaction. Her commissioners could not therefore intend to discuss the status of the native inhabitants of an island that had already accepted cheerfully the American sovereignty and to whom the oath of allegiance to the new sovereignty had been administered by the proper authorities. The statement, therefore, of the Circuit Judge's decision that the "treaty of Paris, unlike earlier treaties * * * did not undertake to make the native-born inhabitants of Porto Rico citizens of the United States," so far as it can be interpreted as attributing a given intention to the Spanish Commissioners, is not justified by the facts.

Let us examine what was the real intention of the American Commissioners.

The history of the stipulations referring to the article about citizenship has been officially recorded, and it is easy to ascertain the real purpose of the American Commissioners.

On the 29th of November, 1898, the Honorable Secretary of State forwarded to the President of the United States Peace Commission, Mr. Day, the following telegram:

"The President wishes to know the opinion of the Commission as to inserting in treaty provisions on the subject of

citizenship *of inhabitants of Philippines which will prevent extension of that right to Mongolians and others not actually subjects of Spain;* also whether you consider it advisable to provide, if possible, for recognition of existence of *uncivilized native tribes in same manner as in Alaska treaty, perhaps leaving to Congress* to deal with status of inhabitants by legislative act.

HAY."

(Foreign Relations of the United States, 1898. Correspondence with the United States Peace Commissioners, p. 961.)

Article III of the Alaska treaty referred to, provides that:

"The inhabitants of the ceded territory, according to their choice reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country." (Compilation of Treaties in Force, 1899, p. 538.)

In the conferences of the 30th of November and of the 6th of December the question of nationality was discussed by the Joint Commission. It is enough to read the discussion of this subject as it appears from the protocols in order to see that the classification of the inhabitants as native of the Spanish Peninsula and native of the territories ceded, was made in answer to the suggestion of President McKinley in the quoted telegram that the American Commissioners were closely following. (Treaty of Peace between the United States and Spain. 55th Congress Document No. 52, Pt. 1, Message of the President, 1899, pp. 236–239.)

But the intention of the American Commissioners is not a matter of legal conjecture. Their explanations make plain and unmistakable the purpose of the treaty.

The Spanish Commissioners, in the Memorandum about the articles rejected by the American Commission, affirmed that the latter had refused "to acknowledge the right of the inhabitants of the countries ceded or relinquished by Spain to choose the citizenship with which up to the present they have been clothed," insisting upon the sacredness of this right of human beings, "constantly respected since the day in which man was emancipated from serfdom." (*Ibid.*, p. 258.)

In answer to that objection, the American Commissioners explained how they understood the article that they had submitted, which was definitely incorporated in the treaty as Article IX. The explanation of the American Commissioners clearly demonstrates that the wording of the Article was aimed against the extension of citizenship by the action of the treaty to the "Mongolians and others not actually subjects of Spain" and to the "uncivilized native tribes" of the Philippine Islands to whom the President referred in his telegram.

The explanations of the article offered in a high spirit of honesty, as shown by its unmistakable terms, read as follows:

"The American Commissioners do not so understand the article upon the subject of citizenship. * * * An analysis of this article will show that Spanish subjects, natives of Spain, are allowed a year's time in which * * * they may preserve their allegiance to Spain.

"As to natives, their status and civil rights are left to Congress, which will enact laws to govern the ceded territory. This is no more than the assertion of the right of the governing power to control these important relations to the new government. The Congress of a country which never

has enacted laws to oppress or abridge the rights of residents within its domain * * * may safely be trusted not to depart from its well settled practice in dealing with the inhabitants of these islands.

"It is true that the Spanish Commissioners proposed an article upon the subject of nationality, * * * which provides that all inhabitants of the ceded territory other than Spanish subjects shall have the right to choose the Spanish nationality. * * * This would permit *all the uncivilized tribes* which have not come under the jurisdiction of Spain, as well as foreign residents of the islands to elect to create for themselves a nationality other than the one in control of the territory, while enjoying the benefits and protection of the laws of the local sovereignty." (Treaty of Peace, Message from the President of the United States, 55th Congress, Document No. 62, Annex 1 to Protocol No. 22, p. 261.)

From this explanation it clearly results that the words "native inhabitants" employed by the treaty were intended to describe "all the uncivilized tribes which have not come under the jurisdiction of Spain", and to distinguish them from the inhabitants of the countries ceded which up to the date of the stipulation of the treaty were clothed with Spanish citizenship. The treaty therefore did not undertake to include under the classification of "native inhabitants," primarily intended to designate the uncivilized tribes of the Philippine Islands, the Spanish citizens born in Porto Rico who were clothed with Spanish citizenship.

A treaty made under the authority of the United States is considered by the Constitution as "the supreme law of the land". The framers of a treaty take therefore the place of the law-making power, and, referring to the value of the intention of the legislator in the construction of the law, this Honorable Court held in Territory of Hawaii *vs.* Osaki Mankichi that:

"Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of

authorities to the effect that the intention of the law-making power will prevail, even against the letter of the statute, or, as tersely expressed by Mr. Justice Swayne in Smythe *v.* Fisk (23 Wall., 374, 380): 'A thing may be within the letter of a statute and not within its meaning; and within its meaning though not within its letter. The intention of the law-maker is the law.' A parallel expression is found in the opinion of Mr. Chief Justice Thomson of the Supreme Court of the State of New York (subsequently Mr. Justice Thomson of this Court) in People *v.* Utica Ins. Co. (15 Johns., 358, 381): 'A thing which is within the intention of the makers of a statute, is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers.'

"Without going further, numerous illustrations of this maxim are found in the reports of our own Court. Nowhere is the doctrine more broadly stated than in The United States *v.* Kirby (7 Wall., 482). * * * 'All laws,' said the Court, 'should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.' * * * 'The reason of the law in such cases should prevail over its letter.'"

Sixth Point.

After quoting the second paragraph of Article IX of the treaty, and Section 7 of the Act of April 12, 1900, the decision states that:

"This legislation has not certainly operated to effect a naturalization of the petitioner as a citizen of the United States."

The quotation made is incomplete, so far as the treaty is concerned, for two reasons: First, because the decision overlooks Article II of the Treaty in which the change of sovereignty was confirmed. Second, because it quotes only

the second paragraph of Article IX, and does not take into consideration the first paragraph of the same article which is essential to a judicial interpretation of Section 7 of the Act of April 12, 1900.

By Article II Spain confirmed the cession to the United States of the Island of Porto Rico and other Islands under Spanish sovereignty in the West Indies.

It is an accepted principle in international law that the nationality of a person follows the nationality of the territory in which such person is born; the word nationality, from the Latin word *nascor* (to be born), being self explaining. This principle has been maintained by this Court when it was decided in Jobin *vs.* Walkingshaw (McAll, 186) that: "On a transfer of territory by one nation to another the political relations between the inhabitants of the ceded territory and the former government are changed and new ones arise between them and the new government."

Concerning Porto Rico the Department of Justice fully concurs in this view when in the case of Mr. Garcia Molinas, the Hon. Attorney-General Knox on May 13, 1902, decided that:

"A native Porto Rican, an artist by profession, although temporarily living in France, on the 11th of April, 1899, is under Sect. 7 of the Act of April 12, 1900 (31 Stat. 79), a citizen of Porto Rico and as such is an American artist." (24 Opinions Attorney-General, p. 40.)

It is true that in the opinion of the Attorney-General occurs the phrase "It will be observed that paragraph 703 (of the Tariff Act of July 24, 1897), does not mention citizenship, but uses the phrase 'American artists.' It is clearly not inconceivable for a man to be an American artist within the meaning of such a statute and yet not a citizen of the United States."

This statement is most perplexing for me. I cannot conceive how a native of a Territory of the United States because he is "a citizen" of said Territory and "as such (as such a citizen) is an American" can be at the same time "not a citizen of the United States." The illustration of the decision that explains the statement, is even more confusing for me when applied to Porto Rico. "An American tribal Indian, or a native Alaskan, for example, who should become an artist and go abroad might naturally be considered an American artist within the intent of the statute." I will not deny the possibility of the tribal Indians or members of the uncivilized native tribes of Alaska going abroad to study fine arts and becoming painters. All is in the hands of the Almighty. But such a case does not seem to have been contemplated by the framers of the tariff law, as it appears easier that members of the uncivilized tribes who become artists and go abroad to study will prefer to renounce the immediate allegiance to their several tribes and swear obedience to the Constitution and the statutory laws of the United States, as do the citizens of Porto Rico, and in such case they will also become American citizens.

This case cannot, however, occur in Porto Rico, as there are not native Indians at present. Already in 1543 there remained only sixty native Indians in the whole Island according to an official report of that epoch. (Report of the Census of Porto Rico, 1899, p. 29.)

On the other hand Porto Rico has not been organized by the Act of April 12, 1900, with the separate national character accorded to some Indian Tribes with whom the United States has made treaties. Said Act was enacted in order to end the military period and did not even restore the Constitution for Self-Government that the Island had received

from Spain in 1897, in great part through American influence.

The Attorney-General does not state what kind of Americans the citizens of Porto Rico are who pay taxes voted by the Congress of the United States, and swear allegiance to the Constitution and to the statutory laws of the United States. But it clearly appears in his learned opinion that the Porto Rican citizens are not "aliens" since he says:

"He (Mr. Garcia Molinas) is undoubtedly one of those turned over to the United States by Article IX of the treaty to belong to our nationality. * * * As his country became a domestic country and ceased to be a foreign country, within the meaning of the Tariff Act above referred to, and has now been fully organized as a country of the United States by the Foraker Act, it seems to me that he has become an American."

The Treaty of Paris, referred to and incompletely quoted by the Circuit Court's decision, has therefore operated to change the status of the Island and of its inhabitants, "turning them over to the United States" as the Attorney-General says.

I admit that a country (in the language of the Attorney-General) or a territory (in the language of this Court) can be ceded to a nation and that the cession may not always necessarily imply that the natives of the ceded territory become citizens of the nation acquiring the same. In our own legislation we have the precedent of the members of the uncivilized tribes of Alaska and the case of the Philippine Islands in which that question appears as a very doubtful one. But in the case of Porto Rico there is not room for doubt. Postponing the question of the incorporation of the Philippine Islands, Congress, as well as the Executive, has not asked from their inhabitants the oath to support the Constitution, nor the statutory laws of the United States,

and they do not form a *body politic* with the American citizens, as in the case of the citizens of Porto Rico. (Sec. 7 of the Porto Rican Act and Sec. 4 of the Act entitled "An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands and for other purposes," approved July 1, 1902.)

The case of the inhabitants of Porto Rico is, in my opinion, a clear case of collective naturalization as distinguished from individual naturalization, that happens when a country or province becomes incorporated in another country (Phillip, International Law, p. 382), the citizens of Porto Rico forming the same body politic with the other citizens of the United States and obeying and supporting the same Constitution and, with the sole exception of the internal revenue laws, the same statutory laws that all the other citizens of the United States obey and support.

The opinion failed to give due weight to the first paragraph of Article IX of the Treaty, according to which the nationality of the territory in which they may reside is guarantee to the inhabitants born in the Spanish Peninsula. This paragraph is essential to a judicial interpretation of Section 7 of the Act of April 12, 1900. Said section establishes the status of *all* the inhabitants, expressly declaring them to be citizens of Porto Rico. The native born in this Territory and the inhabitants born in the Spanish Peninsula were given the same political status. The distinction established in the Treaty was thus effaced by the legislation of Congress and the guarantee given to the inhabitants of the Spanish Peninsula was extended to the natives of the Territory. In the case of Porto Rico, both are to be held, therefore, as having adopted American nationality.

The only further question that could be raised would be whether the word *nationality*, in the language of the Treaty, means something else than national citizenship.

In that connection it is enough to remember that the word nationality is employed in international language, and specially by English and American diplomatists and statesmen, to mean citizenship. In that acceptation it is used, for instance, in the report of the Commission appointed by the Queen of Great Britain to inquire into the laws of naturalization and allegiance (1862) in the course of the great international discussion with American diplomacy about this subject. (Opinions of the principal Officers of the Executive Departments and other papers relating to expatriation, naturalization and change of allegiance. 1873, p. 70.)

The declarations of the American Commissioners in the discussion of the article of the Treaty under consideration, show that this was the exact meaning of the word. "The American Commissioners," they said, "do not so understand the article upon the subject of *citizenship*" (Annex 1 to Protocol No. 22, before quoted). Even if the meaning of the word nationality should not have been so defined, it is hardly admissible that the American Peace Commissioners could have seriously entertained the idea of guaranteeing to civilized men clothed with Spanish citizenship, by the use of the word *nationality*, the privilege of electing under the new flag a status similar to that of the members of the Indian tribes or of the uncivilized native tribes of Alaska. At any rate, such hypothesis is inconsistent with their declaration before quoted.

As Porto Rico is not a foreign country under the protectorate of the United States, but "a territory of the United States" (De Lima *vs.* Bidwell) and "a territory appurtenant and belonging to the United States" (Downes *vs.* Bidwell) the nationality or the citizenship of *all* the inhabitants of Porto Rico to whom the law refers is the United States citizenship.

Seventh Point.

The decision concludes that:

"Being foreign born and not naturalized she (the petitioner) remains an alien."

This statement is but a repetition of the syllogism with which the Circuit Court opinion assumes the conclusion at the beginning of its reasoning, saying:

"It is not disputed that the petitioner was by birth an alien; unless in some appropriate way she has been naturalized she is still an alien."

For that reason I will not discuss again this error, confining my observations to demonstrate the inconsistency of the conclusion of the Circuit Court's decision with the statutory laws and the Constitution of the United States.

In order to demonstrate "ad absurdum" the judicial conflict existing between the very section quoted in the opinion and its conclusion, so far as this means that the citizens of Porto Rico have remained aliens, it is enough to substitute in said section the word "aliens" instead of the words "citizens of Porto Rico." It will result that all inhabitants continuing to reside therein who were Spanish subjects * * * shall be deemed and held to be "aliens" except such as shall have elected to preserve their allegiance to the Crown of Spain * * * in accordance with the provisions of the treaty * * * and that they (the "aliens" who selected the American nationality, and the "aliens" who are natives of the Territory) together with such *citizens of the United States* as may reside in Porto Rico shall constitute a *body politic* under the name of the people of Porto Rico.

The conclusion of the opinion is also inconsistent with the

other sections of the said Act of April 12, 1900. Section 9, for instance, provides "that the Commissioner of Navigation shall make such regulations * * * as he may deem expedient for the *nationalization* of all vessels owned by the inhabitants of Porto Rico * * * and for the admission of the same to all the benefits of the coasting trade of the United States." This provision cannot be enforced if such inhabitants "remain aliens." The laws regulating commerce and navigation cannot protect in such case the interests of such inhabitants because Sec. 4131 of the Revised Statutes of the United States requires such vessels to be "wholly owned by citizens and to be commanded by a citizen of the United States." The citizens of Porto Rico, against the stipulations of Art. IX of the Treaty of Paris, cannot either carry on their professions when engaged in banking business if they aspire to the protection of the statutory National Bank Act, as directors of National Banks in said Territory, because according to said laws "every director must, during his whole term of service, be a citizen of the United States." (National Bank Act, approved June 7, 1872, Sec, 5146 Revised Statutes, U. S.)

If they "remain aliens," they could not prosecute claims against the United States in the Court of Claims, this privilege being reserved to American citizens, or to aliens who are citizens or subjects of a government which accords the same privilege to American citizens as provided in Sec. 1068 of the Revised Statutes.

This question was raised as a consequence of the decisions of this Court in the Insular cases. In order to avoid any misinterpretation as to the right of the native Porto Ricans, Congress enacted the law approved April 29, 1902.

Explaining the object of said law, to enable native Porto

Rican merchants to recover duties paid in Porto Rico upon articles imported from the several States, Senator Foraker plainly made in the report of his Committee (57th Congress, Report No. 1008) the following statements.

"The pending bill expressly confers jurisdiction on the Court of Claims, to adjudicate those claims. This is in order to remove *any possible doubt* which might arise *as to the right of the native inhabitants of Porto Rico*, upon whom Congress has not yet *expressly* conferred American citizenship, to sue the United States in that Court."

If Congress had not implicitly made the native inhabitants American citizens, this language could not have been used nor could their power to sue the United States before the Court of Claims have been considered as a *right*.

And that there is no room for doubt is vigorously expressed in the subsequent statement:

"While the Government does not question *the right of the petitioners as Porto Ricans* to maintain these suits we do not wish to leave the question open. The Supreme Court decided in the Dooley case that the Court has jurisdiction of the subject-matter of the claims; so we are *not endeavoring to extend* the jurisdiction of the Court of Claims over a class of claims of which it cannot now take cognizance."

These explanations show that Congress made the citizens of Porto Rico—the natives of the territory as well as the natives of the Spanish Peninsula—citizens of the United States, omitting only an *express* declaration for temporay political considerations and not with permanent juridical purpose.

If the national citizenship of the native citizens of Porto Rico were not *implicitly* acknowledged, that language could not have been employed by the learned chairman of the

Committee on "Pacific Islands and Porto Rico," Senator Foraker speaking on behalf of his Committee. This declaration coming from the author of the Porto Rican act, constitutes a precise indication of the intention of the legislators in this matter.

The inconsistency of the Circuit Court's decision with the statutory laws of the United States is proved also by the fact that if its judicial finding be true, the officials both of the local and of the national government who have applied to the native citizens, statutory laws made solely for American citizens, cannot, in some instances, escape legal responsibility for actions performed in the fulfillment of their official functions and in the enforcement of the act of April 12, 1900. For obvious reasons, I will quote only a case affecting myself and arising under the Immigration Laws.

In the fulfillment of my duty I have caused to be printed and published in said territory of Porto Rico, advertisements of the Civil Service Commission inviting the citizens, natives and residents of said territory, to take the necessary examinations in order to obtain employment in the United States Civil Service. Several obtained the position to which they aspired, some of them in this city of Washington; and I have assisted and encouraged them in the attainment of their purposes.

If the native citizens of Porto Rico remain aliens and subject to the provisions of the law regulating the admission of aliens who come to *the United States*, as the Circuit Court maintains, this action appears to me to be comprehended in in Sec. 3, of the Act of March 3, 1891, which declares:

"That it shall be deemed a violation of said act of February twenty-sixth, eighteen hundred and eighty-five, to assist or encourage the importation or migration of any

alien by promise of employment through advertisements printed and published in any foreign country; and any alien coming to this country in consequence of such advertisement shall be treated as coming under a contract as contemplated by such act."

Briefly, Section 14, declaring in full force and effect in Porto Rico the statutory laws of the United States, is practically abrogated, according to the conclusion of the Circuit Court, because the statutory laws of the United States, being intended for American citizens, cannot be applied to aliens.

The inconsistency of the theory of the Circuit Court's decision with the statutory laws of the United States appears expressly affirmed in the citizenship laws.

The declaration that the citizens of Porto Rico are "aliens," not only denies to the inhabitants born in the Spanish Peninsula who have adopted the American nationality, the right of expatriation, already exercised by them in accordance with the stipulations of the Treaty of Paris, but denies also the same right to the native inhabitants, who, as we have seen, cannot renounce a foreign allegiance that does not longer exist.

One of the greatest triumphs of American diplomacy in the nineteenth century has been to re-vindicate the right of expatriation as one of the natural and inherent rights of all people in opposition to the old English theory. This principle has been inscribed in our statutory books.

Section 1999 of the Revised Statutes of the United States declares that:

"Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty and the pursuit of happiness, and, whereas, in the recognition of this principle this gov-

ernment has freely received emigrants from all nations and invested them with the rights of citizenship; * * * Therefore, any declaration, instruction, opinion, order or decision of any officer of the United States which denies, restricts, impairs or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic."

Finally, the conclusion that, being foreign born, and not naturalized, she (the petitioner) remains an alien and subject to the provisions of the Immigration Laws, is inadmissible from a constitutional point of view.

The statement that she is foreign born as applied to the petitioner, meaning that she is a native of a territory that was foreign at the time of her birth, is made to deprive her of the right to the same protection of the laws that would be, and is, accorded to other members of the same *body politic.* In this respect such decision establishes an unconstitutional discrimination, because it denies to the native citizens of Porto Rico the right—considered as "a natural right" by this Court in Downes *vs.* Bidwell—to the equal protection of the laws, that according to Article XIV of the Constitution of the United States cannot be denied to "any person within its jurisdiction."

Conclusion.

From the foregoing analysis of the Circuit Court's decision it appears, in my opinion, clearly shown that by the Protocol of August 12, 1898, Porto Rico was ceded by Spain to the United States; that this session was confirmed by Art. II of the Treaty of Paris. Congress, by subsequent legislation, enacted laws for that territory under the clause of the Constitution relating to the territory of the United States (Art. IV. Sec. 3). The island, therefore, has ceased to be a

province of Spain and has become " territory of the United States—although not an organized territory in the technical sense of the word." (De Lima *vs.* Bidwell.)

It is further shown that under the military Government of the United States the inhabitants were released from their former political relations (General Miles' Proclamation—General Brooks' General Order No. 1), and took the oath to support the Constitution of the United States, renouncing forever all allegiance to any prince or potentate or foreign sovereignty and particularly that of the Government and sovereignty of Spain. This form of the transfer of sovereignty was confirmed by the Act of April 12, 1900.

Thus the inhabitants have acquired United States citizenship, and have been incorporated with those who were already American citizens in the same *body politic* according to Sec. 7 of said Act. Some of those who were already American citizens prior to the annexation of Porto Rico have been elected members of the Porto Rican House of Delegates by the native citizens, of Porto Rico, and in other cases as citizens of Porto Rico have cast their votes to elect natives of the Island as their representatives. I myself, a native citizen of Porto Rico, could not be entitled to represent, in a political capacity, the hundreds of citizens of the United States, born or naturalized in the mainland, who have given me their suffrages, if I were an alien. If I were an alien, I could not have attained the highest honor in my professional career, that of taking, as a member of the bar of this Honorable Court, the oath to maintain the Constitution of the United States, this oath being incompatible with allegiance to any other power than that prescribed by, and defined in, the Charter in which the sovereign people of the United States directly created this Court as well as the other Departments of our Government.

Believing, for all the above stated reasons, that Porto Rico has ceased to be a Province of Spain and has become a territory of the United States, and that the inhabitants thereof have ceased to be Spanish citizens and have become American citizens, it is respectfully submitted that the decision of the Circuit Court should be reversed.

Washington, D. C., *November*, 03.

FEDERICO DEGETAU,
Resident Commissioner from Porto Rico,
As Amicus Curiæ.

In the Supreme Court of the United States

OCTOBER TERM, 1914

ISABELLA GONZALES, APPELLANT,

v.

WILLIAM WILLIS, UNITED STATES COMMISSIONER OF IMMIGRATION, PORT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

ISABELLA GONZALEZ, APPELLANT,
v.
WILLIAM WILLIAMS, UNITED STATES commissioner of immigration at the port of New York. } No. 225.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is the case of a native young woman of Porto Rico, who sought to enter this country at New York and was excluded by the immigration authorities on the ground that she was likely to become a public charge. Habeas corpus was issued from the circuit court upon application in her behalf, and that court held that the executive action was authorized by law, and dismissed the writ. The appeal to this court followed.

The case thus raises another aspect of the insular situation, the question here being whether the

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native inhabitants of the insular territorial possessions of the United States are subject to be excluded from this country under the immigration laws as *aliens*.

The treaty with Spain of 1899 (30 Stat., 754), ceding Porto Rico and the Philippine Islands, provides (Art. IX) that Spanish subjects, natives of the peninsula, residing in the ceded territory, may remain there, or may remove, owing obedience to the law and subject to protection, and may preserve their allegiance to Spain by a certain declaration, in default of which they shall be held to have renounced that allegiance "and to have adopted the *nationality* of the *territory* in which they may reside." "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Pursuant to this stipulation, Congress provided by section 7 of the Porto Rican act of 1900 (31 Stat., 77) that, excepting those previous Spanish subjects who had duly elected to preserve their allegiance to Spain under the treaty, all inhabitants continuing to reside therein who were Spanish subjects on the 11th day of April, 1899, and then resided in Porto Rico, and their children born subsequent thereto, "*shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States*, * * * and they, together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of The People of

Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such."

The independence of people of Porto Rico in full measure was preserved, their rights in public property defined and assured, and the unusually complete autonomy of the local government provided for by this act (e. g., secs. 12, 13, 15, 18, 27, 39, etc.). From these sections it appears that particular care was taken to preserve the separate and distinct status of the people and the government of Porto Rico, and to avoid any incorporation in the United States of this appurtenant territory.

I quote for the information of the court, and for purposes of comparison, the corresponding provisions of law relative to the Philippine Islands in an act pursuant to the same stipulation of the treaty.

The army appropriation act of 1901 (31 Stat., 895, 910—the "Spooner resolution") contains certain provisions for the establishment of a temporary civil government in the Philippine Islands, "and for the purpose of maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion." The act of July 1, 1902 (32 Stat., 691), ratified the establishment of the temporary civil government. Section 4 of that act provided that the same class of former Spanish subjects in the Philippine Islands as in the case of Porto Rico, that is, excepting

those who shall have elected to preserve their allegiance to the Crown of Spain, "shall be deemed and held to be citizens of the Philippine Islands, and as such entitled to the protection of the United States." Section 5 of that act is a declaration of rights for the Philippine Islands. In general, this act constitutes the government of the Philippine Islands under the civil governor and the Philippine Commission, in the same way and for the same purposes of establishing local rights and autonomy, as fully as possible, distinct from the United States, as the Porto Rican act did for Porto Rico. See the act, *passim*, and especially section 12 as to the transfer of public property to the Philippine government to be administered for the benefit of the inhabitants thereof; section 13 as to the disposal of public lands; section 17 as to the lease or sale of any portion of the public domain, or for timber license which shall be covered into the insular treasury for insular purposes according to law; section 72 as to the application of proceeds of insular bonds authorized to be issued and sold. All these provisions, as well as the law relating to the grant of franchises (sec. 74), show the regard paid to the local rights and concern in such matters and of the separation of these local public interests free from incorporation in the United States in any just sense beyond the character of appurtenant territory.

Judge Lacombe (rec., pp. 7–8) took the view that since the petitioner was by birth an alien and

has not been naturalized in any appropriate way, she is still an alien and subject to the alien immigration laws; that, unlike previous treaties in somewhat analogous situations, the treaty of Paris did not make the native inhabitants of Porto Rico citizens of the United States, but reserved that question for Congress to determine, and that section 7 of the Porto Rican act did not operate to effect naturalization. The assignments of error (pp. 11–12) are all reducible to the fourth, viz:

> In holding that the petitioner is subject to the provisions of the statutes of the United States regulating the admission of aliens.

ARGUMENT.

I.

THE SCOPE OF THE WORD "ALIENS."

This is an inquiry in which uncompromising insistence on mere words must be avoided. Terminology ought not to be permitted to be tyrannical, so to speak, nor a term be viewed as possessing an unalterable and invariable value for all times and in all situations. We should not be controlled too rigorously by the notion of unbending logical and etymological categories. To so rule would be to accept names or definitions for the real idea and concept. Therefore, to dwell and insist upon an academic and unchanging sense in the word "alien" is not helpful or conclusive. It will not do simply to reiterate in various ways the following proposition: that *alien* means this or that precise

thing and nothing else; that thus accredited definitions and established usage show that this woman is not an "alien;" that whatever else she may be, she is not an *alien*; that this statement is conclusive of the controversy.

Counsel must not urge too sweepingly that the terms "alien," "citizen," "subject," are absolutely and definitely inclusive, and *per contra* mutually exclusive. I submit that these logical categories are neither mutually exclusive nor completely comprehensive. We must observe a similar caution respecting other terms which touch the topic, like "native," "foreigner," "denizen," "resident." All these words are *inter se* synonymous, correlative, or antithetic, but not completely so. The meanings are relative rather than absolute; they shade off into each other, and the outlines of the delimitation are not sharp, but hazy. Let us see what some of the approved definitions of our three principal terms say.

The Standard Dictionary defines *citizen* as "a member of a nation or sovereign State, especially of a republic; one who owes allegiance to a government and is entitled to protection from it;" *subject*, as "one who is under the governing power of another; specifically an individual member of a nation as related to its ruler or government;" *alien*, as "one who owes allegiance to a foreign government; a foreigner; especially an unnaturalized resident foreigner * * *."

In Bouvier's Law Dictionary the definitions of these terms are as follows:

> *Citizen:* One who, under the Constitution and laws of the United States, has a right to vote for Representatives in Congress and other public officers, and who is qualified to fill offices in the gift of the people.
>
> *Subject:* An individual member of a nation who is subject to the laws. In monarchical governments * * * one who owes permanent allegiance to the monarch.
>
> *Alien:* One of foreign birth. * * * In the United States, *one born out of the jurisdiction of the United States and who has not been naturalized under their Constitution and laws.*

In the case of *Dred Scott* v. *Sandford* (19 How., 393, 404) Chief Justice Taney said:

> The words "people of the United States" and "citizens" are synonymous terms and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people and a constituent member of this sovereignty.

And Chief Justice Waite said in *United States* v. *Cruikshank* (92 U. S., 542):

> Citizens are the members of the political community to which they belong. They

> are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights.

I think it may properly be said that we are to regard here, without predilection drawn from definitions, the policy, purpose, reason, and intention of the various laws, and to weigh the inclusion and import of the term *alien* in the light of the spirit and meaning of the law.

I am aware that in the *De Lima* case there was a similar dilemma. The plaintiffs urged that a *foreign* country is one under a sovereignty other than that of the United States. They said that a foreign port is one "within the dominions of a foreign sovereign and without the dominions of the United States" (citing Mr. Justice Story in *United States* v. *Hayward*, 2 Gall., 501); that the idea of merely acquiring the territory ruled the question and not the withholding of political rights. The United States contended that the acquired territory became "a part of the nation to which it is annexed, but on the terms stipulated in the treaty or on such as the new master shall impose;" that it became subject to the United States and appurtenant, but in the international sense, as to relations to all the rest of the world; it did not become domestic in any other sense; and consequently, that until the status was

further changed by legislation, Porto Rico remained "foreign" and articles from there "imports" under the tariff laws; that "newly acquired territory does not become a part of the United States in the legislative sense until Congress shall so determine."

The opinion of the court thus states the Government contention (182 U. S., p. 181):

> But it is earnestly insisted by the Government that it never could have been the intention of Congress to admit Porto Rico into a customs union with the United States, and that while the island may be to a certain extent domestic territory, it still remains a "foreign country" under the tariff laws until Congress has embraced it within the general revenue system. The goods were not admittedly imported; they were not brought into New York from a confessedly foreign country.

The court stated the single question to be whether territory acquired by the United States by cession from a foreign power remains a "foreign country" within the meaning of the tariff laws.

After reviewing prior decisions of the court and the executive rulings and practice, the court said that there is no authority " for holding that a district ceded to and in the possession of the United States remains for any purpose a foreign country." And proceeding then to deal with the question as an original one, and regarding the

power exercised by Congress for a century (whatever be the particular source of the power under the Constitution), the opinion states that—

> Territory thus acquired can remain a foreign country under the tariff laws only upon one of two theories: either that the word "foreign" applies to such countries as were foreign at the time the statute was enacted notwithstanding any subsequent change in their condition, or that they remain foreign under the tariff laws until Congress has formally embraced them within the customs union of the States. The first theory is obviously untenable. While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope. * * * By parity of reasoning a country ceases to be foreign the instant it becomes domestic. * * * The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union presupposes that a country may be domestic for one purpose and foreign for another. * * * We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic.

I do not challenge in the least respect the final determination of the court on the *De Lima* issue; but I say the issue here on the word "alien," however similar in a general way, is essentially

different. It affects persons and not things, people of foreign race and previous alien relations, and not a foreign country. It presents immigration laws and not tariff laws, and the purpose and motive of the former laws differ greatly in nature and object from those of the revenue laws. Opposing counsel made their claim in the *De Lima* case on the mere acquisition of the territory, and in arguing that the withholding of political rights could not affect that question, practically conceded that this reservation differentiated the two questions.

And finally, where contemporaneous with the acquisition there was no withholding of the domestic status so as to affect the tariff relations, there was on the civil status and political rights a reservation which we contend must rule the present situation and retain the alien character. I submit that it is one thing to hold that Porto Rico under the treaty and tariff laws became domestic and instantly ceased to be foreign, and it is quite a different thing to say that a Porto Rican person under the treaty, the organic act, and the immigration laws instantly ceases to be an alien. Consequently I submit that this woman is certainly not a citizen and is still an alien within the meaning of the immigration laws; that the *De Lima* decision as to the word "foreign" does not hold us to a narrow, logical inclosure, or determine that the word "alien" must be etymologically construed in one sense and one only.

II.

THE APPELLANT IS NOT A CITIZEN, AND IS TO BE REGARDED AS AN ALIEN UNDER THE IMMIGRATION LAWS.

It is certain that Isabella Gonzalez is not a citizen of the United States. She was born an alien; as held by Judge Lacombe, she has not become a citizen under any fundamental and constitutional right nor under any law providing either for individual or collective naturalization. Nor is she a "subject;" there is no need for alarm over that term. She is *subject*, in the adjective use of the word, to the sovereignty and laws, to the jurisdiction of the United States as citizens are, and as unqualified aliens are. These latter become in all substantial respects completely subject to our Government when domiciled or temporarily sojourning within our jurisdiction, and are said, therefore, to owe allegiance *pro tempore*. She is not *a subject* in the substantive use of the term simply because in ordinary parlance that word has a conventional meaning and denotes a constituent member of the body politic in a monarchical or imperial government. *Citizen*, on the other hand, in that sense, denotes a member of a republic. It seems that the word "nationals," as currently used, signifies all persons who belong to, who constitute the objects of, any particular government, whether they are citizens, subjects, or in some intermediate category qualifying the ordinary conception of those two terms. All such

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people are called nationals *quoad* the particular sovereignty under which they live, as distinguished from all other peoples on the face of the earth. The suggestion is, after all, a matter of terminology, of the conventional and convenient use of language, and the growing use of the noun *national* does not throw any particular light upon our investigation.

Let it be granted that such people are nationals. It is conceded that they are connected with this Government by a certain tie distinguishing them from other ordinary foreigners with separate governmental relations; that they owe allegiance to and are under the protection of the United States, and that their natural and original alienage has been so far qualified. All this does not resolve the question. Such facts do not operate to confer citizenship, and it remains to be determined whether these various native islanders have this particular right of a citizen of free ingress into the United States, or rest under the corresponding disabilities of an alien notwithstanding the qualification of their alienage.

Put the question another way: Must Congress be held to have intended that all who were not aliens in the strict and unrelieved sense should escape the immigration laws, or, on the other hand, that all who were not citizens should be subject to them? Is construction to confer upon the ambiguous class which lies between the privilege of free ingress, or deny it? Is the true test nonalienage, narrowly regarded, or noncitizenship?

The solution of the controversy is dependent solely on the proper construction of the law. Constitutionality is not really involved. It may be suggested that, since there are certain broad principles upon which the Constitution rests, which are necessarily recognized by it and which are always to be summoned in aid of its meaning, by force of these principles the law to be construed here should be interpreted in favor of the right. For instance, it might be said that, recognizing all men as free and equal, the spirit and historical policy of this nation regards all men as possessing in general many equal rights here, whether citizens or not; that, starting out to admit and welcome to this country as one of the fundamental tenets of our peculiar calling among the nations *all persons* no matter what their nationality and previous condition, any proscription must be very clear. Hence, it might be concluded that this atmosphere of the Constitution pervades the inquiry, and although in the process of time successive limitations of this broad hospitality have been imposed in our sovereign power and for the general welfare, yet restriction must be scrutinized closely, must be beyond ambiguity even in its application to admitted aliens, and where there is an important qualification of alienage, the case must be regarded as *a fortiori*.

But I maintain that any such appeal to the doctrines surrounding the Constitution is remote and without force. The Constitution is silent on this

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subject, and, reasonably read, suggests no rule even by vague inference. It can not be doubted that there is here no such definite constitutional obstacle as was claimed to exist relative to insular tariff taxation in the uniformity clause. There can be no question of the sovereign competence of Congress, now or at any time, to regulate or restrict the entry into this country of natives of our appurtenant territories. It is rightly to be assumed that such regulation or restriction would be based on just and reasonable grounds. The act now before the court is manifestly based upon such grounds. The sole question is whether it is to be construed so as to include these island natives.

III.

PRECEDENT AND SIMILAR SITUATIONS.

The treaty with France for the cession of Louisiana, ratified October 21, 1803, contained the provision (Art. III) that—

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the Federal Constitution to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

The act of October 31, 1803 (2 Stat., 245), enabled the President to take possession of the ceded territory; and the acts of March 26, 1804 (id., 283), and of March 3, 1805 (id., 331), provided a temporary government. By section 5 of the former act "the inhabitants of the said territory" were entitled to the benefits of the writ of habeas corpus, and to bail in certain cases. Section 10 prohibited the importation of slaves "except by a citizen of the United States removing into said territory for actual settlement." By the act of February 20, 1811 (id., 641), the inhabitants of the territory were authorized to form for themselves a constitution and State government.

The treaty with Spain, ratified October 29, 1820 (8 Stat., 252), by which Florida was ceded to the United States, contained a similar provision for the incorporation of the inhabitants of the territory into the Union, "as soon as may be consistent with the principles of the Federal Constitution," and for their admission to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States. The President was authorized by act of March 3, 1819 (3 Stat., 523), to take possession of Florida and establish a temporary government. The act of March 3, 1821 (id. 637), extended the revenue and slave laws of the United States to the ceded territory; and the act of March 30, 1822 (id. 654), established a Territorial government. Section 10 of the latter act provided for the protection of the inhabitants in

their liberty, property, and religion; entitled them to the benefit of habeas corpus, to bail, etc. The act also extended to Florida the laws of the United States not repugnant to the provisions of the act.

The treaty of Guadalupe Hidalgo (9 Stat., 922), by which Mexico ceded California to the United States, provided (Art. VIII):

> Those who shall prefer to remain in the said Territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said Territories after the expiration of that year, without having declared their intention to retain their character of Mexicans, shall be considered to have elected to become citizens of the United States.

Article IX provided that those who should not preserve the character of citizens of Mexico should be incorporated into the Union and be admitted, at a time to be determined by Congress, to the enjoyment of all the rights of citizens of the United States; and in the meantime should be maintained and protected in the free enjoyment of their liberty, etc.

The treaty of March 30, 1867, with Russia, by which Alaska was acquired, provided by Article III (15 Stat., 539) that the inhabitants of the ceded territory might preserve their allegiance to

Russia, returning there within three years, but if they should prefer to remain, they "with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of the citizens of the United States."

We agreed in these cases that the inhabitants should eventually be admitted to citizenship. In practice the matter was necessarily complicated by application to people of many different races and kinds, citizens of the United States domiciled in the territories previously foreign, or actually themselves foreign subjects for a time and then repatriated by the acquisition; "native inhabitants" of European birth and allegiance; aboriginals falling into the peculiar Indian relations to their tribes and the nation; various varieties of half-breeds and negroes, free and slave. But the fundamental principle which disposed of all these attachments of different nature in an orderly way, maintained the hiatus between a status wholly foreign and one wholly domestic until full incorporation of the inhabitants as citizens, and of the territory as Territory or State, came about.

In *United States* v. *Laverty* (3 Mart., 733; Fed. Cas. No. 15569a) citizenship was claimed by virtue of the treaty with France ceding Louisiana to the United States, which provided that the inhabitants of the ceded territory should be incorporated in the Union and be admitted to citizenship as soon as possible. The treaty was concluded in 1803,

but the territory was not admitted to the Union until 1812; and the opinion of the court intimates that prior to its admission its inhabitants were not regarded as citizens.

This case appears to me significant and instructive, and I dwell on it somewhat. During the war of 1812 certain persons of British birth who were arrested as alien enemies claimed that they were *bona fide* inhabitants of the Territory of Orleans at the time of its admission into the Union, and thus became citizens of Louisiana and of the United States. The Government contention was that Congress alone may naturalize foreigners by a uniform rule. The opposing contention was that the power to admit new States is not inconsistent and admission operates as collective naturalization. The court points out that in pursuance of an act of 1802 the inhabitants of the Ohio portion of the Northwest Territory were authorized to form a State government and subsequently the State was admitted; that the population, governed previous to admission by the "Ohio ordinance," consisted partly of citizens of the United States and partly of foreigners—"a great body of aliens resided among them;" that the real inhabitants of the country, citizens or foreigners, were authorized to form a State government and the act of admission made no distinction. In the Louisiana case it had been contended (the court points out) that the inhabitants who were to be, by the treaty,

admitted to the immunities of citizens were only those who were inhabitants in 1803, and therefore that the act of 1811 which enabled "the people of the Territory of Orleans" to form a State government did not include those becoming inhabitants after 1803. But the court held otherwise, and declares the law not to mean merely the inhabitants at the date of the treaty; that the only question was whether Congress had the right to include any others than citizens in their act of admission, which had been answered affirmatively by the Ohio precedent. The court held that if the treaty provision for admission meant that nevertheless there should be individual compliance with a uniform rule of naturalization, then the old Louisianians were not citizens yet, for they had not complied with that law. The court thus repelled the notion that the treaty stipulation, by not providing for regular naturalization, was unconstitutional and void. And so in the present case the treaty stipulation, leaving a burden, as it were, by explicitly withholding citizenship rights, is no more to be challenged than the same kind of explicit provision in previous treaties conferring the privilege. The court remarked:

> The expression under the treaty is that they shall be admitted according to the principles of the Constitution; that is, with the consent of Congress, which shall be obtained as soon as possible, and it has been since given. By this construction every

> part is reconciled, and if Congress in their liberality included others who have since settled in the country, they had a right to do so.

An inhabitant in that case is defined to be "one whose domicile is here, and settled here, with an intention to become a citizen of the country."

The import of that case undoubtedly is, in accordance with the natural and reasonable view of the treaty and the laws, that until Congress gave consent the pledge of the treaty, which was expressly to be carried into effect only "as soon as possible," had not been carried out, and that until it was carried out the inhabitants, although residing in territory of the United States and fully subject to protection, were aliens. If the decision had been the other way in the *Laverty* case, the necessary effect would have been to hold the Englishmen involved as alien enemies; and accordingly, in a note to the decision it is said that a considerable number of persons born in the British dominions who had resided in Louisiana under the Territorial government ceased to be considered as British subjects, and as such liable to the restrictions imposed on alien enemies. The treaty made a promise; it did not operate as a collective naturalization; subsequent action by Congress was necessary to effect that result.

In *American Insurance Co.* v. *Canter* (1 Pet., 542) the question involved was as to the validity of an act of the Territorial legislature of Florida.

Considering the relation in which Florida stood to the United States, Chief Justice Marshall said:

> The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. * * * The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.

The general principles upon the subject of alienage are stated as follows by Johnson, J., in *Inglis* v. *Sailors' Snug Harbor* (3 Pet., 99, 155):

> The rule commonly laid down in the books is, that every person who is born within the ligeance of a sovereign is a subject, and, *e converso*, that every person born without such allegiance is an alien. This, however, is little more than a mere definition of terms, and affords no light to guide us in the inquiry * * * what are the facts and circumstances from which the law deduces the conclusion of citizenship or alienage? * * * Two things usually concur to create citizen-

> ship; first, birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience * * * of the sovereign. * * * The general principle of the common law also is that the allegiance thus due by birth can not be dissolved by any act of the subject. * * * Upon the *cession of a country* it passes to the new sovereign. * * * Upon the conquest of the country it passes by operation of law to the conqueror, who, as sovereign de facto, has a right to the allegiance of all who are subdued by his power and submit to the protection of his his arms.

The case of *Elk* v. *Wilkins* (112 U. S., 94) was an action brought by an Indian, claiming to be an American citizen, against the registrar of a city ward for refusing to register him as a qualified voter. The court (Gray, J.) held that an Indian, born a member of one of the Indian tribes within the United States, is not, merely by reason of his birth in this country, and of his voluntarily separating himself from his tribe, etc., a citizen of the United States. I quote from the opinion of the court, as follows:

> The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities. * * * The alien and dependent condition of the members of the Indian tribes could not be put off at their

> own will, without the action or assent of the United States, except under explicit provisions of treaty or statute to that effect. Indians born within the territorial limits of the United States, * * * although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the fourteenth amendment than the children of subjects of any foreign government born within the domain of that government. * * * Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the fourteenth amendment, by being "naturalized in the United States," by or under some treaty or statute. * * *
>
> The national legislation has tended more and more toward the education and civilization of the Indians, and fitting them to be citizens. But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself.

The court quotes the following language from an opinion by Judge Deady in a case arising under the statutes forbidding the sale of liquor to Indians (*United States* v. *Osborn*, 2 Fed. Rep., 58):

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> An Indian can not make himself a citizen of the United States without the consent and cooperation of the Government. The fact that he has abandoned his nomadic life or tribal relations and adopted the habits and manners of civilized people may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one not born to can assume without its consent in some form.

The court also cites an opinion of Attorney-General Cushing (7 Opin., 746) dealing with the status of Indians in relation to citizenship and the preemption of public lands. In that opinion Mr. Cushing classes Indians as "denizens" or "domestic aliens," and states that—

> It is a mistake to suppose that *alien*, as opposed to *citizen*, implies *foreigner*, as respects the country.
>
> The fact, therefore, that Indians are born in the country does not make them citizens of the United States.
>
> The simple truth is plain, that the Indians are the *subjects* of the United States, and therefore are not, in mere right of home birth, citizens of the United States. The two conditions are incompatible. The moment it comes to be seen that the Indians are domestic subjects of this Government, that moment it is clear to the perception that they are not the sovereign constituent ingredients of the Government.

> This distinction between *citizens* proper—that is, the constituent members of the political sovereignty—and *subjects* of that sovereignty, who are not therefore citizens, is recognized in the best authorities of public law. (See Puffendorf, De Jure Naturæ, lib. vii, cap. ii, s.)

In *United States* v. *Wong Kim Ark* (169 U. S., 649), which discusses exhaustively the question of citizenship from the standpoint of birth within the country, the court quotes from Binney on the Alienigenæ of the United States as follows (p. 665):

> The common-law principle of allegiance was the law of all the States at the time of the Revolution and at the adoption of the Constitution; and by that principle the citizens of the United States are, with the exception before mentioned (namely, foreign-born children of citizens, under statutes to be presently referred to), such only as are either born or made so, born within the limits and under the jurisdiction of the United States, or naturalized by the authority of law, either in one of the States before the Constitution, or since that time, by virtue of an act of the Congress of the United States. * * * The right of citizenship * * * is incident to birth in the country, or it is given personally by statute.

The case of *Caignet* v. *Pettit* (2 Dall., 234) is interesting as showing that there may be a class of persons who are not *citizens* of any country.

Plaintiff in that case had been a native of France, residing at Santo Domingo at the time of the French Revolution; but before France became a Republic he came to the United States and took up his residence in Pennsylvania. He had not been naturalized under the statutes, but had been "heard to express his abhorrence of the existing constitution of France; he had never done any act showing his assent to it, and he had declared an intention to settle permanently in America." It was contended that the plaintiff necessarily remained a French citizen; that he was not a citizen of the United States, and that "unless he was a citizen of France he exhibited the extraordinary spectacle of a human being who had no country." The court, holding that he was not a citizen of France, said:

> It is true that he has not acquired the rights of citizenship here, nor, as it appears, in any other country. But whatever may be the inconvenience of that situation, he had an undoubted right to dissent from the revolution, and * * * to refuse allegiance to the new Government and withdraw from the territory of France. Everything that could be said or done to manifest such a determination has been said and done by the plaintiff, except the act of becoming the subject or citizen of another country.

That unfortunate individual was without country simply because he had legally abandoned one country and had not yet attached himself to

another; he had not yet even become a "national," much less a citizen. Here, by the operation of various laws, these people have become nationals, clearly not citizens. There is no such painful incongruity, and we are not subject to the obnoxious imputation of claiming that they are people without a country. Nevertheless, I repeat that they have not left their alienage by birth so far and so fully that they may be held to escape our alien prohibitions.

If authorities in international law are examined (e. g. Calvo, Droit Int., t. 2 pp. 124, 125, Halleck, Int. Law, pp. 813, *et. seq.*) I think they show that nothing is predicated of the effect of cession beyond the general change of nationality and the general results of practice under treaties like our early ones. Nothing can be drawn from any of these authorities, I submit, to weaken the Government contentions in the present case.

The following instances show how the attitude of the United States on this question has been applied:

One Gisbert, a native inhabitant of the Philippines, went to Spain and was enrolled by the Spanish military authorities notwithstanding his certificate of registration issued by the United States authorities at Manila, and a certificate by the United States consul-general at Barcelona stating that he was a native inhabitant of the Philippines and under the protection of the United States. The case was brought to the attention of

the Spanish Government by our minister, who pointed out that while Gisbert could *only* be regarded as a *native inhabitant* under the protection of the United States, he could not, in view of the treaty, be regarded as a subject of Spain liable for military service. Whereupon the Spanish authorities exempted him. (Foreign Relations, 1902, pp. 949–954.)

A Chinese merchant, long domiciled in the Philippines, who married a native of the Philippines in 1899 and had issue, a son, born there in 1902, went with his family on a temporary visit to China and applied to be registered in our consulate, or, failing in that, to have his wife and child registered. His object was stated to be to transfer his property to the wife or child so registered, thus putting it under American ownership and avoiding certain Chinese tax exactions bearing heavily on nonresidents. The Acting Secretary of State disposes of the case by holding that while the particular Chinese person comes within the language of the statute "inhabitants of the Philippine Islands," he is not included within the description "who were Spanish subjects on the 11th day of April, 1899." It was not shown that during his domicile there Spanish citizenship had, in fact, been acquired. That under the rule that the nationality of the wife follows that of the husband, she became a Chinese subject; and that the son is not a *citizen of the Philippine Islands* within the meaning of the statute, as that applies

only to children of inhabitants of the islands who were Spanish subjects on April 11, 1899. (Letter from Mr. Adee to United States consul at Amoy, of September 15, 1903.)

In another case, that of *Mercado*, a native of Porto Rico, resident, however, in Venezuela for fourteen years, who desired the intervention of this Government in a claim against the Government of Venezuela, it was held that he was not an inhabitant of Porto Rico at the time of its cession, and was not a citizen of Porto Rico within the definition of the law, and that he was not entitled to the protection of the United States. (Mr. Adee to Mr. Loomis, August 10, 1901; Manuscript Instructions to Venezuela.)

On the other hand, in the case of *Marrero*, a native of Porto Rico, resident in Chile since 1884, who proposed, however, in 1901 to return to Porto Rico to perform his duties as a citizen there, it was held that the language of section 7 of the Porto Rican act was to be construed in its general legal sense in which continued personal presence is not necessary to constitute continuous residence; and that a native of Porto Rico who makes it his permanent domicile does not therefore lose the benefits of the law because he was temporarily residing elsewhere when it went into effect. (Foreign Relations, 1901, p. 32.)

These instances, of course, express only the executive construction and practice regarding the law, but I submit that they manifest an intent to

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follow its letter and spirit, and that these applications of the law bring into relief the reasonable and natural meaning of the language. In these concrete instances the executive authorities did, in fact, apply the law correctly, and the just inferences from these cases show that local citizenship only has been conferred, along with protection derived from the allegiance, and that beyond such point the previous alien status is not as yet qualified.

Article XI of the Spanish treaty provides that Spaniards residing in the territories shall be subject to the jurisdiction of the courts of the country, and shall have the right to appear and pursue the same course therein as citizens of the country to which the courts belong, not as citizens of the United States.

IV.

THE RECENT INSULAR CASES.

We come now to the arguments and the decisions in the insular cases so far as they touched the present question.

Those cases anticipated this question in an illustrative way rather than as indicating settlement.

In discussing the effects of cession upon the question of citizenship, it was argued by the learned counsel who appeared in this case that the word "citizen" has two meanings, designating, first, "the persons exercising political rights and members of the ruling body politic,"

and, second, "the whole people of any nation without regard to the form of government," in the latter sense meaning simply "subject to the allegiance." (182 U. S., 70.)

The argument there and here touches upon the test by birth. The citizen is one who must not only be born within the territorial limits, but subject to the jurisdiction.

In order to avoid the ambiguity due to this dual sense, the Germans and French make use of the word "nationals" to denote all persons subject to the allegiance of the State; and counsel contended that, "generally speaking, therefore, nationals and aliens would include every person within a given territory, and would indicate the legal relations which they hold to the public authority of such territory."

It is said, then, that "nationals" are divided into two classes—those who possess political rights and those who do not. The latter class includes women, minors, and persons who, for a variety of reasons other than alienage, do not possess such rights. (*Minor* v. *Happersett*, 21 Wall., 162.)

It is argued that the fourteenth amendment, declaring that "all persons born or naturalized in the United States and subject to their allegiance are citizens," uses the word in the sense of "national" or "subject."

"Subject and citizen are, in a degree, convertible terms as applied to natives; and though the term citizen seems to be appropriate to republican

freemen, yet we are, equally with the inhabitants of all other countries, subjects, or we are equally bound by allegiance and subjection to the government and law of the land." 2 Kent Com., 258, note. (Quoted from the opinion of Mr. Justice Curtis in the Dred Scott case by Mr. Justice Gray, speaking for the court, in the case of Wong Kim Ark, 169 U. S.)

It is to be observed, as shown in the argument which we are now discussing, that in the colloquies between the American and Spanish commissioners of the terms of the treaty. the Spanish commissioners contended for the full consideration of citizenship rights, in accordance with modern treaties of territorial cession (like the Louisiana and Florida treaties). The American commissioners pointed out the allowance to *Spanish subjects, natives of Spain*, stating:

> As to natives, their status and civil rights are left to Congress, which will enact laws to govern the ceded territory. This is no more than the assertion of the right of the governing power to control these important relations to the new Government.

And thereupon the American commissioners emphasized the historical liberty of Congress as to the rights of residents within its domain. (Annex 1 to protocol No. 22, treaty of peace between the United States and Spain.)

The commissioners evidently did not mean that Congress was empowered to govern dependents in

any unconstitutional or obnoxious sense. But it is likewise perfectly clear that the commissioners intended to keep natives or residents out of the citizenship category, or out of any approximate category, *quoad* the relations to this country, until Congress should enact otherwise.

The opposing argument contends in effect that the dismemberment of populated territory from a State on the one hand, and its incorporation into a new nationality on the other, operate as a collective naturalization *ipso facto*. (182 U. S., 77.) But *incorporation* is just what this treaty avoided, and if the authorities do not use the word in that sense, then by collective naturalization they merely indicate the general change of nationality.

Indeed, if counsel used these words with any strict meaning, then they simply intended to say that by the acquisitions of these island territories we have naturalized the inhabitants and they have become citizens, notwithstanding the precautions against that result.

Collective naturalization by the force of a treaty must necessarily mean the force which grants, and not the force which withholds. If a treaty were silent on the subject, the argument would be against the grant, because our own precedents clearly require an explicit affirmative provision.

I am not really required in this case to deal with the question whether the fourteenth amendment does in fact settle the status of persons born in these island territories since the cession, and therefore I

do not discuss that question. But the amendment clearly says that "all persons *born* or *naturalized in the United States*, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." And Mr. Justice Curtis, in his dissenting opinion, in the Dred Scott case, states that, in his view, under the Constitution, every person *born on the soil of a State*, and who is a citizen of that *State*, by force of its Constitution or laws, is also a citizen of the United States.

I entirely agree with the proposition previously laid down by counsel, viz:

> What rights human beings owing direct and immediate obedience to the sovereign in whose jurisdiction they may reside are to possess is a question for that sovereign to determine in a constitution or by legislation, but subjection or nationality merely express a relation of fact, to wit, allegiance and protection. (182 U. S., 84.)

This is all the claim of nationality here means, and the sovereign has determined by a treaty and by legislation what rights for the time being are possessed, and the particular rights set up here are not included. I do not, of course, agree with the conclusions drawn from that proposition by counsel, namely, that the inhabitants of Porto Rico born subsequent to the cession, and not under a direct immediate allegiance to any foreign nation, are citizens of the United States, and as such possess "whatever rights are generally conferred upon

that class by law." In this passage by the words "that class," obviously counsel means *citizens*.

When the reservation was incorporated in the stipulations by the negotiators of the treaty, and when the following laws retained it, emphasizing the fact that no grant has yet been made which merges the identity of the previous foreigner into that of a member of the people of the United States, evidently Congress was of opinion in enacting the more recent laws that the act of 1893 applied to these peoples until its ban against them was explicitly removed. The previous foreigner has now come under the sovereignty of the United States; that is the dominant and general allegiance; it involves a corresponding right of protection. He is also a member of the people of Porto Rico, or of the Philippine Islands, as the case may be, and thus belongs fully to the local body politic. He is not yet a member of our domestic body politic; further right has been withheld, and the partial change in his status from the previous wholly foreign status has not conferred upon him automatically this or that particular right not expressed in any grant by which citizens have been distinguished from conceded aliens.

The treaty and laws register the various events by which the absolute foreign status has been measurably qualified. It will doubtless be contended that a specific and explicit prohibition by a law subsequent to the acquisition of Porto

Rico and the Philippines was necessary; that Congress, by not expressly including "native inhabitants" in the alien prohibitions, must be assumed to have intended to admit them, no matter what their defects under the classification of alien disabilities. But there was a previous bar, and an express reservation of any change in status. This argument seems to me plainly unreasonable, in view of the well-known attitude and policy of Congress regarding the entire subject of immigration. When we look at the matter as a question purely of intention, of conscious and continuing understanding by Congress of what the laws before us—the treaty, the Porto Rican and Philippine government acts, the immigration laws enacted previous to the Spanish war, and the codifying act of 1903—sought and meant when read together, there can be no real question that the construction by Congress excludes; that is surely the legislative construction. Under the events and enactments presented, Congress manifestly thought that no further specific prohibition was necessary to bar, but that, on the contrary, an additional explicit allowance is necessary to admit. The proposition by no means is "Once a foreigner, always a foreigner, although our Government rules and protects and our flag flies as a symbol of sovereignty in the new possessions." The proposition simply is, "Once a foreigner, native and resident in lands beyond the seas, still a

foreigner as to certain civil rights, local and peculiar to the home territory and status, including this particular civil right, until Congress declares and provides otherwise."

As to Mr. Coudert's additional arguments contained in his brief in the present case, they do not differ materially from his previous argument as to "native inhabitants" presented in the De Lima and Downes cases. I have already gone over that ground.

The learned resident commissioner from Porto Rico, in a brief filed by him as *amicus curiae* under leave of court, naturally and earnestly contends for the larger proposition that "native inhabitants are now citizens of the United States," pointing out, indeed, the different aspect of the question shown by the view that it is not a *native* of Porto Rico, but a *citizen* of Porto Rico who is claimed to be a citizen of the United States. That, however, begs the question. It is of course conceded that those native inhabitants who have come under the allegiance and protection of the United States are citizens of Porto Rico; but our contentions are that, although citizens of Porto Rico, they are not citizens of the United States, and are to be regarded as aliens under the immigration laws until Congress determines otherwise.

The learned commissioner also contends that the aliens excluded by the law must have come from a foreign port, because the act of August 3, 1882, one of the acts "to regulate immigration,"

imposed a duty of 50 cents for every passenger not a citizen of the United States who shall come by vessel from a foreign port (22 Stat., 214). Another act upon the subject, entitled "An act to regulate the carriage of passengers by sea" (August 2, 1882; 22 Stat., 186), protects "emigrant passengers" who have embarked at any port or place in a foreign country or dominion, except those in contiguous foreign territory. The full stress of the decision in *De Lima* v. *Bidwell*, and of certain executive rulings which are cited—one expressly relating to the act of August 3, 1882—can not thus be imposed upon the present case, because the immigration law with which the court is now concerned does not contain the words in question, and those words can not be drawn into that law, since the particular subsidiary acts are in reality one a "passenger act" for the protection of emigrants, rather than an immigration-exclusion law at all, and the other a law levying a head tax upon a particular narrower class of noncitizens in order to create an immigrant fund to be used for the benefit and relief of such noncitizens. Since the immigrants to be cared for and relieved are "immigrants arriving in the United States," I do not undertake to argue that Congress (not foreseeing the present situation) did not then regard the two classes as identical, and contemplate in general that every alien immigrant passenger arriving would come from a foreign port. But I do say that this feature of such laws can not justly

be carried into the particular law which we are discussing.

The learned gentleman gives an interesting résumé of the status of Porto Rico and its inhabitants under the Spanish Crown, previous to the transfer of sovereignty, and argues that there was a complete change of this status, first under the military government of the United States, next under the provisions of the treaty. He suggests that by the treaty Spain did not abandon her sovereignty nor even relinquish it, but simply confirmed the transfer of sovereignty already accomplished under the military government, and agreed to by a former diplomatic transaction. (Message of the Spanish Government: Foreign Relations, 1898, pp. 823, 824.)

Señor Degetau goes on to contend from the diplomatic negotiations and the exchanges of the respective commissioners that the words "native inhabitants" as employed by the treaty merely intended to describe the uncivilized tribes of the Philippine Islands, and did not include Spanish citizens born in Porto Rico. But, as he indicated that the designation of uncivilized tribes was only the primary intention in the use of the phrase "native inhabitants," I presume we may conclude that ultimately the intention embraced also the Spanish citizens of Porto Rico.

The perplexing dilemma referred to by Señor Degetau on page 33 of his brief is, of course, the

very one before the court, and the dilemma is resolved when we say that these people are American in nationality and citizens of their islands, but not of American citizenship; that, although now Americans internationally, they retain their former alienage in large degree, and are excluded under the imigration laws by the effect of the treaty and statute reservations until Congress affirmatively removes the ban of those laws respecting them.

The learned gentleman's appearance here under the privilege of admission to this court, accorded to him because the court, I suppose (with deference), saw no reason why he could not be permitted to take the requisite oath of allegiance, commands respect because of the earnestness and ability with which he has presented the case of the island people whom he represents. It would be in high degree improper and untrue to describe this gentleman standing here as an alien. As he suggests by his closing statements of the incongruities involved, it would not be accurate or just to describe in general and unqualifiedly the native inhabitants, the citizens of Porto Rico, as aliens. But these incongruities are apparent rather than real. They do not in fact exist. And "American" as these peoples are, in the broad international sense, and citizens of their native islands, nevertheless those who are afflicted (I trust, few in number) with the defects and disabilities specified in the immigration laws are to be treated as aliens under those laws.

But the language quoted (p. 29) from a memorandum of the American commissioners seems plainly to indicate that the words "native inhabitants" were intended to include all inhabitants of the islands other than those "Spanish subjects, natives of Spain," who should elect to preserve their allegiance to Spain. (Annex 1 to Protocol 22, S. Doc. 62, 55th Cong., 3d sess., pp. 261–262.)

To take up now the recent insular decisions:

Mr. Justice Brown, in announcing the conclusion and judgment of the court in *Downes* v. *Bidwell*, points out the distinction between the Thirteenth amendment, prohibiting slavery not only within the United States but also "in any place subject to their jurisdiction," and the Fourteenth amendment, which limits citizenship to persons born or naturalized in the United States, etc., and does not extend to those born in any place "subject to their jurisdiction."

That opinion thus refers to the treaty stipulations respecting the inhabitants under the Louisiana purchase:

> This evidently committed the Government to the ultimate, but not to the immediate, admission of Louisiana as a State, and postponed its incorporation into the Union to the pleasure of Congress. (*Downs* v. *Bidwell*, 182 U. S., 252.)

Mr. Justice White says on this point (p. 333):

> * * * it indubitably results * * * third, that the opinion which prevailed was

that, although the treaty might stipulate for incorporation and citizenship under the Constitution, such agreements by the treaty-making power were but promises depending for their fulfillment on the future action of Congress. In accordance with this view the territory acquired by the Louisiana purchase was governed as a mere dependency, until, conformably to the suggestion of Mr. Jefferson, it was by the action of Congress incorporated as a Territory into the United States and the same rights were conferred in the same mode by which other Territories had previously been incorporated; that is, by bestowing the privileges of citizenship and the rights and immunities which pertained to the Northwest Territory.

* * * * *

Mark the language. It expresses a promise: "The inhabitants of the ceded territory *shall be incorporated into the Union of the United States*." Observe how guardedly the fulfillment of this pledge is postponed until its accomplishment is made possible by the will of the American people, since it is to be executed only "as soon as possible under the principles of the Federal Constitution." If the view now urged be true, this wise circumspection is unnecessary, and, indeed, as I have previously said, the entire proviso was superfluous, since everything which it assured for the future was immediately and unalterably to arise (p. 325).

The case was precisely the same under the Spanish treaty of 1819.

Noting the recent Hawaiian case as touched upon by Mr. Justice Brown, it may be said that the annexation resolution (30 Stat., 750) was silent on the subject of the admission of native Hawaiians into this country, establishing a rule only as to the Chinese residents there; while the organic law (31 Stat., 141, 161) set the point at rest practically by making the citizens of the former republic of Hawaii citizens of the United States, and by establishing definitely the particular exclusion of the Chinese aliens resident there.

Again, *per* Mr. Justice Brown, the court says (*Downes* v. *Bidwell*, 182 U. S., 279–280):

> We are also of opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American Empire." There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges, and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, tradi-

tions and modes of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that "the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible * * * to the enjoyment of all the rights, advantages, and immunities of citizens of the United States;" in the case of Mexico, that they should "be incorporated into the Union, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States;" in the case of Alaska, that the inhabitants who remained three years, "with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights," etc., and in the case of Porto Rico and the Philippines, "that the civil rights and political status of the native inhabitants * * * shall be determined by Congress." In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.

Again, at page 282 in *Downes* v. *Bidwell:*

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and

from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race or by scattered bodies of native Indians.

We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. * * * Of the latter class are the rights to citizenship, to suffrage [citing *Minor* v. *Happersett*, 21 Wall., 162], and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants—whether they shall be introduced into the sisterhood of States, or be permitted to form independent governments—it does not follow that in the meantime, awaiting that decision, the people are, in the matter of personal rights, unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the princi-

> ples of the Constitution to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States [citing various authorities].

Per Mr. Justice White, concurring in the *Downes* v. *Bidwell* judgment (182 U. S., pp. 312–313):

> It seems to me impossible to conceive that the treaty-making power, by a mere cession, can incorporate an alien people into the United States without the express or implied approval of Congress. * * * If the proposition be true [that the treaty-making power can absolutely incorporate territory, but may not insert conditions against incorporation], then millions of inhabitants of alien territory, if acquired by treaty, can without the desire or consent of the people of the United States, speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the Government be overthrown.

Here, again, the argument is directed against complete incorporation and absolute citizenship. But the argument applies to the consequence, less revolutionary but nevertheless impossible to grant, of such an approach to citizenship as assures unrestricted entry into this country.

These expressions show forcibly what would be the result of standing on an uncompromising view

of the word "alien." The immediate and irrevocable incorporation referred to of millions of inhabitants of alien territory would present many aspects affecting personal and property rights and various governmental relations. It would be accomplished *pro tanto* up to the measure of granting substantial rights of citizenship by the construction that these millions of inhabitants were at least so far incorporated as to permit their unrestricted entry into this country. The learned justice proceeds to show the extent and effect of the argument of immediate and irrevocable incorporation as follows (id., pp. 313–314, 315):

> And the consequent result—incorporation—would be beyond all future control of or remedy by the American people, since at once, and without hope of redress or power of change, incorporation by the treaty would have been brought about. The inconsistency of the position is at once manifest. The basis of the argument is that the treaty must be considered to have incorporated, because acquisition presupposes the exercise of judgment as to fitness for immediate incorporation. But the deduction drawn is, although the judgment exercised is against immediate incorporation, and this result is plainly expressed, the conditions are void because no judgment against incorporation can be called into play. * * * If the treaty with Spain incorporated all the territory ceded into the United States, it resulted that the millions of people to whom

> that treaty related were, without the consent of the American people as expressed by Congress and without any hope of relief, indissolubly made a part of our common country.

Again, *per* Mr. Justice White (id., pp. 333–334):

> Whilst drafted in accordance with the precedent afforded by the treaty ceding Louisiana, the Florida treaty was slightly modified in its phraseology, probably to meet the view that under the Constitution Congress had the right to determine the time when incorporation was to arise. Acting under the precedent afforded by the Louisiana case, Congress adopted a plan of government which was wholly inconsistent with the theory that the territory had been incorporated. * * * It will serve no useful purpose to go through the gradations of legislation adopted as to Florida. Suffice it to say that in 1822 (3 Stat., 654, c. 13) an act was passed as in the case of Missouri, and presumably for the same reason, which, whilst not referring to the Northwest Territory ordinance, *in effect endowed the inhabitants of that territory with the rights granted by such ordinance.*

In Mr. Justice Gray's concurring opinion he cites the clause of the treaty relating to the native inhabitants as clearly recognizing the control over acquired territory belonging to the Executive and the legislature.

In the dissenting opinion delivered by the Chief Justice he cites *United States* v. *Percheman* (7 Pet., 87), containing the following passage:

> The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed.

The question here is whether, like the rights of property, the alien disabilities remain undisturbed until it has been provided otherwise. That the change in allegiance and sovereignty have not produced this effect seems to be implied or intimated in the following language of the Chief Justice, citing the significant article of the treaty, and not suggesting the acquirement by the native inhabitats, notwithstanding this article, of such rights as are here claimed (182 U. S., pp. 369–370):

> Doubtless the subjects of the former sovereign are brought by the transfer under the protection of the acquiring power, and are so far forth impressed with its nationality, but it does not follow that they necessarily acquire the full status of citizens. * * * This [the treaty reservation as to civil rights] was nothing more than a declaration of the accepted principles of international law applicable to the status of the Spanish subjects and of the native inhabitants. It did not assume that Congress could deprive the inhabitants of ceded territory of rights to which they might be

entitled. The grant by Spain could not enlarge the powers of Congress, nor did it purport to secure from the United States a guaranty of civil or political privileges.

In the first Dooley case Mr. Justice White's dissenting opinion stated the following as one of the propositions which seemed to him to have been theretofore established (*Dooley* v. *United States*, 182 U. S., 222, 237):

> 3. As the treaty with Spain provided "that the civil rights and political status of the native inhabitants should be determined by Congress," in reason this provision should not be controlled by conclusions deduced from treaties made by the United States in the past with other countries which did not contain such a provision, but expressly stipulated to the contrary.

In the *Diamond Rings case*, the Chief Justice, detailing the successive steps of acquisition, thus expresses the view of the court (183 U. S., 151, 179):

> The Philippines thereby ceased in the language of the treaty to be Spanish. Ceasing to be Spanish, they ceased to be a foreign country. They came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established. The result was the same, although there was no stipulation that the native inhabitants should be incorporated into the body

> politic, and none securing to them the right to choose their nationality. Their allegiance became due to the United States, and they became entitled to its protection.

On the tariff side of the insular controversy it was determined by *De Lima* v. *Bidwell* and *Downes* v. *Bidwell* that when foreign territory has been fully acquired it becomes domestic and appurtenant, and duties may not be collected on goods arriving therefrom under the antecedent general tariff act as upon importations from a *foreign* country; but nevertheless that Congress may by a subsequent statute explicitly impose import duties against insular goods without violating the constitutional rule of uniformity of taxation throughout the United States.

I have endeavored heretofore, in discussing the reasonable limits of insisting upon the logical contents and effect of a mere term, to contend that no such conclusive and exclusive force should be attributed to the word "aliens" in this antecedent law as was given to the word "foreign" in that antecedent law by the De Lima decision. For here we have many special and separate reasons of policy and intent, residing in the nature of the case, for denying that the use of the term prior to the unforeseen events of war and acquisition brings us to a dilemma which can only be solved upon the same absolute and etymological construction of a word. But even if the De Lima decision should be held to extend to the word "aliens" here the

court's doctrine respecting the word "foreign" there, still, under the *Downes case*, we have a clear settlement of the present dispute, because the supreme law, as expressed both in the treaty and the statutes, provided as clearly that the personal alien status should remain unchanged as if the language had been, "Native inhabitants of the insular possessions of the United States shall continue to be subject to the alien immigration laws until otherwise provided." And furthermore, in the present case there is no principle or provision of the Constitution which raises doubt as the uniformity clause did respecting insular tariff taxation.

The opinion of the court in the Hawaiian case of *Mankichi* (190 U. S., 197) shows again that until Congress definitely acts and provides by legislation, certain provisions of the Constitution do not extend to new territory; that there is a hiatus, so to speak, suspending the full determination of rights and obligations and the complete application of principles and methods of government, between the act or instrument of acquisition and the organic law. The decision was in effect that, while the particular constitutional right of trial in criminal prosecutions by common law proceedings through grand and petit juries did not apply from the moment of annexation, most if not all the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from that moment. The two rights alleged to be violated in that case were held not to be

fundamental in their nature, but to concern merely a method of procedure which long use, long practice, and the conditions of the Hawaiian Islands had established and vindicated. Here, I say, there is no fundamental right, and the hiatus between alienage and citizenship has been preserved by positive law.

V.

THE IMPORT OF THE INSULAR DECISIONS IN THIS QUESTION.

I have endeavored as far as possible to quote from the various opinions in the insular cases on this point alone, and to avoid those general principles and other aspects wherein the divergences in those cases sharply appear. Necessarily, however, this question runs somewhat into the other questions; but I think we may justly reach these conclusions respecting the attitude or intimations of the court on the question now presented: That in the view of a majority of the court in *Downes* v. *Bidwell* there was, upon general principles, no incorporation of "native inhabitants" into our body politic; and in view of the express reservation by the treaty, recognized by subsequent legislation, it was and is necessary for Congress to determine what the exact status and rights of these inhabitants shall be.

Notwithstanding the differing reasons for the opinion of the majority of the court in *Downes* v. *Bidwell* and the earnest dissents of the minority from the judgment in that case, I submit that the

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dissents do not suggest any conflict with the argument of the Government in the present case. It is evident, I think, that all the members of the court look to the reservation in the treaty and the laws on the subject of civil status, have in view the clear intention and authoritative effect of these particular reservations, and because of the reservation, if not on general grounds, intimate that citizenship at least has not been conferred, and do not in the least intimate that, beyond the obvious shifting of allegiance and protection, beyond the impressing of the new nationality, "so far forth," as the Chief Justice says—that is, as brought "by transfer under the acquiring power"—any particular changes or enlargements of rights of the alien status have yet been acquired or conferred.

VI.

THE HISTORY AND PURPOSE OF THE IMMIGRATION LAWS.

I take up now this branch of the topic in order to show the field on which the will of Congress operates, the will of the nation as expressed in its laws, the policy and purpose to be subserved by the exclusion of certain aliens, and the meaning or bearing, therefore, of the reservation in the treaty and the law involved, by which "native inhabitants" were left in the alien status for the present.

By acts now embraced in section 2158 et seq., Revised Statutes, the "involuntary immigration" of "coolies," being "the subjects of China, Japan,

or any other oriental country," was prohibited, but voluntary immigration (or emigration) of such persons was not restricted. The purpose of this law manifestly was protective to unfortunate aliens likely to be held to service or labor. The old idea of a free asylum for all peoples had not been qualified; the reasons for limitation in the national interest had not yet begun to press.

By the act of March 3, 1875 (18 Stat., 477), this new purpose appears first in connection with the law relating to coolies; the immoral purpose appearing in such involuntary immigration is recognized, and the law forbids that branch of the "coolie trade," and the importation of women in general (that is, without respect to oriental origin) for immoral purposes; and the admission of "convicts," as described in section 5 of that law, is prohibited. This was the beginning of the forbidden or excluded classes.

By acts of August 3, 1882 (22 Stat., 214), of February 26, 1885 (23 Stat., 332), February 23, 1887 (24 Stat., 414), and October 19, 1888 (25 Stat., 565), provision was made for the return of forbidden immigrants, the importation of alien contract labor was prohibited, and various stringent rules were made for the enforcement of the law.

Pari passu with these statutes the body of Chinese-exclusion laws was enacted and developed.

By the act of March 3, 1891 (26 Stat., 1084), the inadmissible classes were enlarged to include mental and physical defects and indigency. As

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that law is the one before the court, I repeat here that category precisely, viz:

> All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the foregoing excluded classes, or to the class of contract laborers excluded by the act of February 26, 1885. * * *

The act of March 3, 1893 (27 Stat., 569), made or authorized certain regulations as to shipment of alien immigrants from abroad, as to the liabilities of vessel owners and masters, and as to classification for purposes of manifesting, etc. Other Chinese-exclusion statutes were passed in this interval. And finally, by section 2 of the codifying act of March 3, 1903 (32 Stat., 1213), the excluded classes are further enlarged to include other degrees or kinds of defectives (e. g., "epileptics," "anarchists"), and the list is explicitly reenumerated.

Now, it is manifest that Congress, reflecting the convictions of the country, found it necessary for our welfare to exclude these dangerous or burdensome classes of foreigners. It is evident that from

the point of view of our civilization and well-being the perils aimed at, or some of them, would proceed especially from oriental and tropical countries as well as from certain other parts of the world remote in space, culture, or race ideals from our own country. For it is matter of common knowledge that in the Orient and the Tropics, as a rule, unfavorable climatic conditions, overcrowding of population, primitive notions and methods in hygiene, different (and, to our conceptions, low) standards of living and moral conduct, extreme and willing indigency, all combine to produce in most marked degree many of the very evils at which the law was aimed.

We find that the court has sustained in the broadest terms the sovereign right of the nation to exclude aliens, the authority of Congress to enact such laws to carry into effect this sovereign right and the national will and policy, and has noted the purpose and motive of the laws.

In the case of *Nishimura Ekiu* v. *United States* (142 U. S., 651), involving the right to admission into the United States of a Japanese person, Mr. Justice Gray, delivering the opinion of the court, said (p. 659):

> It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and

upon such conditions as it may see fit to prescribe. * * * In the United States this power is vested in the National Government. * * * It belongs to the political department of the Government, and may be exercised * * * through statutes enacted by Congress. * * *

In *Holy Trinity Church* v. *United States* (143 U. S., 457), the court, by Mr. Justice Brewer, referring to the situation which called for the alien contract labor law of February 26, 1885, quotes from the opinion of Mr. Justice Brown as district judge in the case of *United States* v. *Craig* (26 Fed. Rep., 795, 798).

In the *Japanese Immigrant case* (189 U. S., 86), which involved the right to exclude a Japanese person as a pauper, under the immigration act of March 3, 1891, the court, by Mr. Justice Harlan, says (p. 97):

> A statute excluding paupers or persons likely to become a public charge is manifestly one of police and public security. * * * The constitutionality of the legislation in question, in its general aspects, is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions,

> conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court [citing *Ekiu* v. *United States*, 142 U. S., 651; *Fong Yue Ting* v. *United States*, 149 U. S., 698; *Lem Moon Sing* v. *United States*, 158 U. S., 538; *Wong Wing* v. *United States*, 163 U. S., 228; *Fok Yung Yo* v. *United States*, 185 U. S., 296, 305].

I submit that the underlying reason and necessity of all such laws require that this bar against "native inhabitants" should be maintained until Congress has had full opportunity and has deliberately determined their *status;* that the question should not be improvidently settled on dialectics and scholastic insistence on the word "alien," in the face of reservations, the intention and just effect of which are, I think, apparent, viz, to connect our new tropical possessions with the existing exclusions. It certainly seems to me that the treaty-making power and Congress had in mind the very oriental and tropical dangers to which I have alluded. Shall the broad design be ignored because there is a hiatus in explicit and clinching statement, *eo nomine* applying the immigration laws, or shall the brief general expression used, by reason of the lack of comprehensive details, be regarded as inartificial and insufficient to preserve the *status quo ante?*

We have done and are doing great things for these peoples, mainly at our cost rather than their

own. We are conferring on them inestimable boons, as will some day be recogniz d cordially by them and all the rest of the world. We freed them from tyrannical foreign government, and the corrupt, selfish, or absolutist designs of their own insurgent chiefs. For these ends, most of all, we gave our own blood and treasure, not as a rhetorical and insincere phrase, but in sober fact. If national sovereignty and dignity also urged this course, and general gains to civilization concurred, that does not make the sacrifices for the island localities any the less. We do not ignore the manhood and rights of the native inhabitants in their own islands—our appurtenant territorial possessions—or in the United States, or in the rest of the world wherein we stand for their protection and secure development. We have shown and are showing that we give them autonomy as fully and as promptly as is possible for them and us and the rest of the world. It can not be doubted under the language of the treaty and the law that we will settle their status in due time (and in prompt time if our national character and our actions toward them heretofore are to be trusted), and fairly and, indeed, generously. In the meantime can we not leave them, and have we not left them by the existing law, in the civil situation respecting ourselves which they occupied before the Spanish war and the treaty of peace? Are they not still "aliens" within the meaning and exclusions of

the law in question, although their alienage has been slightly qualified, by the effect of events rather than by the result of substantive law? Can we not look over the ground deliberately and study this vast and complex problem, pregnant with consequences to our welfare as well as theirs? Has the strict and technical meaning of a word opened a door which we thought had been securely closed until Congress should open it?

I am very confident that these questions must be answered so as to sustain the Government contention and that the court will so declare. And I respectfully submit, therefore, that the order below should be affirmed and the petitioner be remanded for deportation.

HENRY M. HOYT,
Solicitor-General.

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JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

ISABELLA GONZALEZ, APPELLANT,
v.
WILLIAM WILLIAMS, UNITED STATES commissioner of immigration at the port of New York. } No. 225.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES WITH ESPECIAL REFERENCE TO JURISDICTION.

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I know that this court scrutinizes with care any and every argument addressed to it, and no particular request to do so is necessary. But as points were raised at the hearing which have demanded an especially careful study and reflection by counsel, I request the court to consider the arguments here formulated as the final and emphatic statement of the Government's position on the entire case, and I ask the court to weigh these arguments accordingly.

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I.

JURISDICTION.

The question was suggested from the bench on the hearing whether the jurisdiction to determine the petitioner's status is not exclusive and final in the executive authority under the act of August 18, 1894.

Counsel on both sides assumed, it seems, too hastily, that the executive jurisdiction could not be regarded as exclusive and final when the challenge of the case is that the woman is not an alien at all. The position of opposing counsel is that the executive authority does not attach and retain its hold as exclusive and final unless alienage is conceded; that otherwise a native-born American citizen, on arriving from abroad, might be deported under an arbitrary exercise of the executive power without any recourse whatever.

In stating my concurrence with opposing counsel so far as to incline to the view that under all the circumstances of this case, and with the denial at the threshold of any alien character whatever, it was a proper case for the courts, I did not intend to concede the point. In any event, being jurisdictional, no concession could withdraw it from the court, and being presented now from the bench for deliberate examination, I submit the authorities which tend to show that notwithstanding the nature of the question and the denial of

alienage, the determination of the point belongs to the executive and not the judicial authority.

The statute provides (act of August 18, 1894, 28 Stat., 390):

> In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of the Treasury.

No appeal appears to have been taken in this case, and, obviously, the first contention to be made is that even if the woman were ultimately entitled to habeas corpus she was not in a position justly to obtain the writ until she had prosecuted an unavailing appeal to the Secretary of the Treasury, and thus pursued her remedy in the executive course to the uttermost. At the most, the executive jurisdiction when fully invoked and pursued may be voidable, but is not void *ab initio*.

It was stated from the bench, and by the member of the court who delivered its opinion in the *Lem Moon Sing* case (158 U. S., 538), which affected a Chinese merchant having a permanent domicile in the United States, that the same argument was suggested there as herein, viz, the possibility of the deportation of a native-born citizen of the United States, but that this argument of a possible abuse of power did not affect the decision in that

case. I suppose the plea of possible abuse of power, of an unwarranted or outrageous use, was made in the argument of all such cases. It was certainly made in the *Japanese Immigrant Case* (189 U. S., 86), and yet the court therein sustained the executive action as manifesting due process and the executive jurisdiction as exclusive. It is pertinent to quote the following sentences from the opinion of the court (p. 101):

> An act of Congress must be taken to be Constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute arbitrary power implied in the contention of the appellant.

This language repels the argument based upon the possibility of an abuse of power, either that which would deny due process in the case of a conceded alien, as well as that which might deport as an alien a native-born citizen. Of course that opinion related to one whose alien character could not be disputed. The just reasons for excluding those who come within the intention and terms of the law are strikingly shown by the *quære* of the opinion, which, noting the existing treaty with Japan, with its express exception, respecting liberty of entry, of any regulation relating to police and public security, questions whether, even in the absence of such a provision in the treaty the clause

granting "full liberty to enter, reside," etc., refers to that class in either country who from habits or conditions are the object of police regulations designed to protect the general public against contact with dangerous or improper persons.

The cases heretofore mentioned and others like them (e. g., the *Nishimura Ekiu* case, 142 U. S., 651) related to admitted aliens. The case last cited arose under the immigration law now before the court, which contained a provision for finality of decision by the executive officer similar to that in the act of 1894. The only difference between the two laws appears to be that the act of 1894 covers the case of every alien, including Chinese, whereas the provision of the act of 1891 from its context is restricted to the exclusion of other aliens because of the disabilities specified in that act.

In the case of *Nishimura Ekiu* it was said by the court that—

> An alien immigrant prevented from landing by any such officer [customs or immigration officers] claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.

The opinion, after stating that a statute may make an executive officer the sole and exclusive judge of the existence of the relevant facts, and

no other tribunal unless expressly authorized by law to do so is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted, held that the particular decision was within the authority conferred upon the inspector of immigration by the act of 1891, and as no appeal was taken to the superintendent of immigration, that decision against the petitioner's right to land in the United States was final and conclusive.

In the *Lem Moon Sing* case one claim was that the alien was entitled of right under some law or treaty to enter the United States, and therefore in excluding him the immigration officers exceeded their jurisdiction, and, a judicial question being thus presented, the courts might intervene. But it was held that under such interpretation of the act of 1894 the provision that the decision of the appropriate immigration or customs officer should be final unless reversed on appeal to the Secretary of the Treasury would be of no practical value. This may also be true as to *any* claim of right, not only a claim under a law or treaty in behalf of an alien, but also a claim, as here, that under the treaty and under general public law affecting the interpretation of the treaty, the petitioner is not an alien at all. Under such claim also the finality provision of the act of 1894 would be of no practi-

value. From both the *Lem Moon Sing* case and the Japanese *Nishimura Ekin* case it is evident that the failure to appeal to the Secretary of the

Treasury from the decision of the subordinate officer leaves that decision final and conclusive.

In the case of Chin Bak Kan the aliens claimed citizenship on mere assertion not established by proof, but the question of the *executive* authority to determine finally and conclusively without judicial intervention was not presented. The case came up on appeal from a judgment of a district court affirming an order of deportation by a United States commissioner. Nevertheless the language of the court clearly tends to sustain the view that the question of alienage is not necessarily withdrawn from the immigration authorities at the frontier by simply asserting the claim of birth within the country. The jurisdiction of a commissioner in Chinese cases does not differ greatly from that of the executive officers in alien immigration cases in general. The authority is *quasi*-judicial in each case. A right of conclusive determination, subject to a particular express appeal, is given in each case—in one case to the district court, in the other to the Secretary of the Treasury. And the court held in *Chin Bak Kan's* case that it is competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends in Chinese cases, under the *Wong Kim Ark* decision, and under the law which requires a Chinese person to establish by affirmative proof and to the satisfaction of the commissioner his right to remain in

the United States. The opinion of the court thus proceeds (189 U. S., pp. 200, 201):

> As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements can not be avoided by the mere assertion of citizenship. The facts on which such a claim is rested must be made to appear; and the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency without being able to show that it was ever possessed. * * * The same reasoning in respect to the authority to exclude applies to the authority to expel, and the policy of the legislation in respect to exclusion and expulsion is opposed to numerous appeals; and we are not disposed to hold that where a Chinese laborer has evaded the executive jurisdiction at the frontier and got into the country he is therefore entitled to demand repeated rehearings on the facts.

The Chinese aspect of the matter is peculiar, of course, and the court was contemplating in that case a typical claim of citizenship without support in facts and not shown to be *bona fide* and meritorious. This aspect of the matter is not present in the case before the court, because here the facts are clear, and the claim made of American nationality or citizenship, of non-alienage, appears to be a pure question of law and construction. But the

reasoning and principle of the *Chin Bak Kan* decision justify the contention that the determination of a claim that an applicant is not in fact an alien is committed to the immigration officers on arrivals at the frontier as fully and properly as it is committed to commissioners in the peculiar jurisdiction of Chinese cases arising within the body of the country.

The decisions in the *Chin Bak Kan* case and the *Japanese Immigrant Case* were applied by United States District Judge Wheeler in the matter of *Moy Quong Shing et al.* on habeas corpus. The case is not yet reported. I give it in a separate appendix to this brief, along with a similar opinion of Judge Ray (*post*). I quote here from the opinion as follows:

> That such citizen [that is, a native-born citizen] of whatever race, on arriving at a port of this country, is entitled to come is not questioned or questionable. The contention now is that when such a claim is made, the executive officers have not authority to pass upon it, and that it must go for decision, if denied, to courts or judicial officers on some proper proceeding, of which this is said to be one. That the legislative department may exclude any race or classes of any race not citizens from the country, and identify and return those not entitled to come, by executive as well as judicial officers, seems to be too well settled by numerous and uniform decisions of the

> Supreme Court to require or warrant citations. And in *Chin Bak Kan* v. *United States* (186 U. S., 193) Mr. Chief Justice Fuller for the court said, after referring to *United States* v. *Wong Kim Ark*, where it was held that Chinese persons born in the United States are citizens, "It is impossible for us to hold that it is not competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends under that decision." It seems equally impossible to hold that when Congress can commit the execution of the law and the decisions of questions arising thereunder to the decision of executive officers, it can not also include the fact as to place of birth. The judicial powers of a commissioner are wholly conferred by act of Congress; and power to decide questions arising in executive proceedings may as well be conferred upon executive officers as upon others. These questions as to the place of birth of these applicants arose for decision, with other questions, before this officer, and no other way but for him to decide them is made apparent.

The writs were thereupon discharged and the Chinese persons remanded.

Within the last few days United States District Judge Ray in the northern district of New York has reached the same conclusion in the matter of *Sing Tuck or King Do* and thirty-one other Chinamen (not yet reported). The court, after citing the cases hereinbefore referred to, with others,

showing that Congress has full authority to confer upon executive officers of the Government plenary power to exclude or deport aliens of any nationality, says that, notwithstanding the claim of the Government that the power to exclude and deport aliens necessarily includes the power to try and determine the question whether the person excluded or proceeded against is an alien—

> It does not necessarily follow that, for purposes of exclusion or deportation, the power to determine who are aliens and who are citizens may be conferred by Congress on the executive officers or executive department of the Government.

The court proceeds:

> At first blush it would seem clear that a person claiming to be a citizen of the United States has the right to have that alleged fact, if disputed under circumstances involving his liberty and property rights, determined in the courts and according to the established rules and forms of legal procedure. If not so, then any citizen may be deported, in effect banished from the United States, if it is charged that he is an alien, and laws excluding and deporting all aliens are enacted, on the judgment of any executive officer on whom Congress may see fit to devolve the determination of the question of expulsion, etc., and consequently that of citizenship. * * * Has any decision of the Supreme Court of the United States gone to the extent of holding any such doctrine?

The opinion quotes from the *Nishimura* case, the *Lem Moon Sing* case, and the *Fok Yung Yo* case (185 U. S., 296, 305). It is pointed out that those cases refer to admitted aliens; and, quoting from *Wong Wing* v. *United States* (163 U. S., 228), wherein the court said that the United States can devolve the power and duty of identifying and arresting the persons included in a decree of exclusion or expulsion, the opinion asks the question whether in using the word "identifying" the court may not be understood as holding that it is competent for Congress to devolve upon executive officials the power to ascertain and determine who are and who are not aliens. The opinion further says:

> This court finds no case decided by the Supreme Court of the United States holding that Congress may commit to the Executive Department, under the interstate commerce clause of the Constitution, the right to determine finally the question of the citizenship of a person applying for admission into the United States.

The court then deals with the question as an original question, and holds that there is no distinction between an immigration inspector at the frontier and a United States commissioner within the country in regard to the nature of the authority exercised. "Neither is exercising the judicial power of the Government, for it is not vested in

either of them, and, as said, can not be." The conclusion is:

> It is competent for Congress to confer upon any inferior officer of the Government, especially those appointed by the Department of Commerce and Labor, which has power to regulate the coming of all persons into the United States, plenary power to determine the various facts on which citizenship depends (so far as they relate to persons applying for admission into the United States), and that an appeal may be taken to the Secretary of Commerce and Labor, whose decision shall be final. If no appeal is taken, then the determination of the inferior officer is, of course, final, res adjudicata of those facts [citing the Chin Bak Kan case]. Judgment has been passed by those officers competent and duly authorized and having jurisdiction to pronounce it, and this court is without power in this proceeding to annul or reverse it. The petitioners are not deprived of their liberty without due process of law, for they have had a competent tribunal in which to be heard, a hearing with opportunity to present their evidence, a judgment or determination, and the right of appeal, all according to the law of the land. This is due process of law. [Citing the *Japanese Immigrant Case.*] * * * It is not intended to hold, and this court is not to be understood as holding, that cases may not arise (extraordinary in their nature

and facts) where an appeal to the courts in appropriate proceedings may not be had; but under the facts of this case as presented to the court and as presented to the executive officers, noncompliance with the law on the part of those petitioners "can not be evaded by the mere assertion of citizenship" made at this time and in this manner.

(See separate appendix.)

It may be that a certain distinction is to be drawn between the decision of the status where the concrete fact as to place of birth will determine it, and where, as here, the facts are clear, and it may be said that a pure question of law arises thereon. But the controlling principle must be that the executive authority is to pass upon the whole inquiry, in which both facts and law are mingled, at least until, at the very end of the executive procedure, it may become the duty of the courts to say whether the vital question of citizen or subject status is of such a nature or is raised in such a way as to carry the inquiry on into the judicial jurisdiction.

The court has been heretofore advised of a proceeding before the district court of the United States in northern Ohio, wherein, upon the same logic drawn from the fear of unbridled executive action, it was held that a Chinese coolie, manifestly of that race, and of the ordinary laboring class, who had recently entered the country clandestinely, was not a Chinese person. The view of

the court was that, although it appeared that the man was born in China, of full-blooded Chinese parents and grandparents, his racial character should be shown by strict scientific proof, and ordinary impressions on the subject, and even the Chinaman's own testimony or admissions were mere matters of opinion. That was a case arising within the country and coming before the court on appeal from an order of deportation of a United States commissioner. The decision seems to the Government to deprive it absolutely of any power under existing law to remove these forbidden aliens from the country, and shows how the unqualified notion of a possible abuse of power may vitally injure the Government as well as protect an alien. The court thus indicates its views of the frontier aspect of the situation and of the danger that the executive authority might deport an undoubted citizen of the United States:

> What the Government might do through its executive officers we have nothing to do with in this court. The Government can say that you may go out and arrest anyone whom you please, whom you suspect to be a Chinese person, and deport them. We can not interfere with that. But when the Government provides that so far as arresting a person within the body of the community is concerned, it shall be done in the courts of justice, then it seems to be an intimation that the ordinary rules of courts of justice shall prevail and shall

> guide in determining the issues thus raised. * * * But when you may arrest anyone in the body of the country by process of law, affidavit, and warrant, and bring them to the bar of a court charged with being of a race practically deprived of rights that would exist if they were not of that race, that is another matter; because this arrest may be directed against any person in the community at the will of the maker of the affidavit. He is not excluded from arresting a citizen of the United States, a subject of Great Britain, or a citizen of any nationality. They may be brought in here under this charge, and the court can not distinguish as they come in whether they are persons who have rights or persons who have none. (Stenographer's transcript on bill of exceptions in *United States* v. *Hung Chang*, D. C. U. S. for the northern district of Ohio, eastern division; not yet reported.)

In certain cases in lower courts, arising both under the Chinese exclusion laws and other immigration laws, it has been held that the executive jurisdiction was not completely conclusive and did not oust the jurisdiction of the courts. (*In re Panzara*, 51 Fed. Rep., 275; *Gee Fook Sing* v. *United States*, 7 U. S. App., 27.) These cases were cited and distinguished in the *Lem Moon Sing* case (158 U. S., 549). See also *In re Martorelli* (63 Fed. Rep., 437), and the opinion of Judge Lacombe in the case at bar. (Rec., p. 7.)

In the customs jurisdiction the proceedings are,

of course, largely judicial, finally reaching the courts on review. The beginning, however, is the executive determination both on valuation and as to the rate and amount of duties. Respecting the former matter, that is, appraisement of value, the Board of General Appraisers performs an appellate executive function rather than the judicial function which they exercise on dutiable classification. Appraisement, then, is final with the executive authority (sec. 13, customs administrative act; *Passavant* v. *United States*, 148 U. S., 214) unless the appraiser or collector "has proceeded on a wrong principle contrary to law, or has transcended the powers conferred by statute." (*United States* v. *Passavant*, 169 U. S., 16.)

I think it must be admitted that the executive authority does not necessarily take jurisdiction in this field and determine finally and conclusively that it may do so even where there is an initial challenge on this point, because the cases show that to cause this peculiar jurisdiction firmly to attach and the remedy to be exclusive, it must first be conceded or shown that the merchandise affected is in point of fact embraced within the law. That is to say, this matter is jurisdictional at the threshold, and accordingly it was decided that where an article is claimed not to be "importable," not to be taxable or dutiable as imported merchandise (which claim was ultimately sustained; *The Conqueror*, 166 U. S., 110, 121), there is no remedy under the customs administrative act, and that law does not

apply. (*In re Fassett*, 142 U. S., 479, 487.) Similarly, in *De Lima* v. *Bidwell* (182 U. S., 1, 174) it was held that the customs jurisdiction does not attach when the particular merchandise was not brought from a foreign country, and was therefore not *imported*. The statement of Mr. Justice Blatchford in *In re Fassett* is quoted and approved, viz: "The collector has no authority to make a determination regarding an article which is not imported merchandise."

In the case referred to by Mr. Justice Holmes (*Miller* v. *Horton*, 152 Mass., 540) there was a statute of that State providing that "in all cases of farcy or glanders the commissioners, having condemned the animal infected therewith, shall cause such animal to be killed without an appraisal, but may pay the owner or any other person an equitable sum for the killing and burial thereof." The court say:

> Taken literally, these words only give the commissioners jurisdiction and power to condemn a horse that really has the glanders. The question is whether they go further by implication, so that if a horse which has not the disease is condemned by the commissioners, their order will protect the man who kills it in a subsequent suit, by the owner, for compensation. * * * When, as here, the horse not only is not to be paid for, but is to be condemned without appeal or without giving the owner a hearing or even notice, the grounds are very strong for

believing that the statute means no more than it says, and is intended to authorize the killing of actually infected horses only.

After reviewing the authorities the court concludes that the literal and, as it thinks, the true construction of the law seems to be the only safe one to adopt, and accordingly it is of opinion that the authority and jurisdiction of the commissioners to condemn the horse was conditional upon its actually having the glanders.

There is another analogy, drawn from a different field, it is true, in which, however, the same principle of the right of the executive to proceed in its jurisdiction free from intervention by the courts appears. It has been determined in many cases arising under the land laws, and showing challenges of the jurisdiction, that, as a general rule, a matter of administration in various Executive Departments can not, pending such administration, be taken away from the departments and carried into the courts. "These departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States." (*Brown* v. *Hitchcock*, 173 U. S., 473, 477.) This view sustains the suggestion which I have made above, that at least there was no right of invoking the courts in the present case until an appeal had been taken to the Secretary of the Treasury and denied.

On the other hand, and looking again to cases under the land laws, in *Menotti* v. *Dillon* (167 U. S., 703, 719) the court was considering the question of law whether the effect of a certain statute of the United States was to confirm to a State lands which at the time were withdrawn from preemption, etc. Affirming the doctrine that under that act certain questions of fact were for the land department to determine in accordance with the general doctrine sustaining the jurisdiction of the land department under acts of Congress, the court nevertheless was "of opinion that while the decision of the land department was conclusive as to all facts upon which it necessarily rested, it was not conclusive as to the question of law involved in the decision." The case suggests the inquiry in the present controversy whether the point is indeed a question of fact or a pure question of law, or a question of mixed fact and law.

Recurring to the earlier immigration cases in the lower courts, in *In re Panzara* (51 Fed. Rep., 275) the court was speaking of a case where the uncontradicted testimony showed that the petitioners were not alien immigrants and, holding that therefore it became the duty of the court to declare to be void the order of the immigration officer that the petitioners be returned to Italy, the court thus stated its conception of the law:

> The statute conferring power upon the superintendent of immigration to order the

> return of persons arriving in the United States from foreign countries confines his power to alien immigrants. He has no jurisdiction to direct the return to a foreign country of a person not an alien immigrant. The question, whether the petitioner is an alien immigrant, is therefore a jurisdictional one, and the finding of the commissioner upon that question is not conclusive upon the courts. That question, when presented to the court by a petition for habeas corpus, must be decided by the court upon the evidence presented to the court in such proceeding.

That case was decided June 1, 1892, and the law involved was evidently sec. 8 of the very act of 1891 now before the court.

In the case of *Martorelli* (63 Fed. Rep., 437), Judge Lacombe states that it was affirmatively and satisfactorily shown that on October 10, 1894, the relator did not belong to any one of the classes of aliens excluded from admission into the United States under the same act of March 3, 1891, and the other immigration laws then in force.

> These acts refer to aliens who are imported into or who migrate into this country, not to persons already residents here who temporarily depart and return. Sebastiano was an alien immigrant when he came here in 1887; he was not one when, after his temporary absence, he returned in October, 1894.

The court thus in that case largely relied upon

the distinction between an alien who seeks to enter this country for the first time, and one who is returning here after a temporary absence, and may therefore be regarded as not an *immigrant*. The *Panzara case* is cited as authority; and in that case also the petitioners claimed that they were not alien immigrants but residents of the United States, wherein they had acquired a domicile and were merely returning to their homes here after a voyage to Italy undertaken *animo revertendi*.

In *In re Neuwirth* (123 Fed. Rep., 347), it was held that under section 10 of the last immigration law (act of March 3, 1903, 32 Stat., 1213, 1216), providing that the decision of the special board, based on the certificate of the examining medical officer, shall be final as to the rejection of aliens afflicted with a loathsome or dangerous contagious disease as under the prior act of August 18, 1894, the only jurisdictional fact necessary to the conclusiveness of such decision is the alienage of the immigrant, and when that is shown the decision can not be reviewed by the court on the question of the existence or character of the disease. The language of the court is:

> Under this earlier act [the act of August 8, 1894], it has been repeatedly held that the only jurisdictional fact to be established in these cases was the alienage of the immigrant, and that when that appeared the court would not review the decision of the

board, either on habeas corpus or on certiorari. The language of the act of 1903 is somewhat different, but it is not thought that by thus modifying it Congress intended to provide that before the decision of the board could be accepted as final by the court it must first be made to appear by independent proof as a jurisdictional fact that the rejected alien was actually afflicted with the specified disease.

These cases appear to show as a matter of first impression that while all other matters are within the competence and exclusive right of decision of the specified executive officers, the question whether or not the applicant is an alien is not so. And at first blush it would seem to be necessary to grant that upon this point there is no difference, or little difference, between the extent of the executive authority originally conferred by section 8 of the act of 1891, and the more express or complete provisions of the act of August 18, 1894. It would thus apparently be necessary to admit that alienage or nonalienage is an essential jurisdictional question, which being determined, an incident or element of the jurisdiction, like the presence or absence of a particular disability, say a specified disease, would fall within the executive authority. In the Massachusetts case it is to be noted the question whether or not the particular animal was afflicted with the disease was itself the jurisdictional question. And this admission as reasonable

or necessary would not, perhaps, be much affected by the statement of Judge Lacombe in the present case, citing the cases of *Martorelli* and *Panzara*. The learned judge appears to say that those cases, which were decided after or without respect to the act of August 18, 1894, "held to the contrary" of the proposition that "upon all other questions the decision of the appropriate immigration officers, when adverse to the admission of the alien, is made final unless reversed on appeal to the Secretary of the Treasury." Judge Lacombe himself decided the *Martorelli* case. But as I read those cases they decided *in accordance with* that proposition, viz, that upon all other questions the executive decision is final, holding, however, as the emphatic question in such a case, that the jurisdiction essentially depends upon alienage.

Nevertheless in the case of *Lem Moon Sing* (158 U. S., p. 549) this court also points out that the *Panzara* case and a similar case under the Chinese exclusion laws do not support the Chinaman's claim that the action of the executive officers could be reached and controlled by the courts. The inference from the language is that the law of 1894 is more complete and effective in sustaining the exclusive executive power than the previous law, and the inference also is, notwithstanding the fact that Lem Moon Sing was an admitted alien, that the reach of the law includes any case and any claim of right, even such a claim as here, where a

person, *prima facie* an alien and excluded as such, insists that as matter of law and right she is not an alien in point of fact.

I confess that the question of the degree or scope of the executive right is difficult to define and maintain on undoubted principle in these peculiar circumstances. This perhaps explains why (unconsciously, as it were) counsel below and in this court did not fully investigate and submit the point with the authorities. The legal nature of the vital question, its national import, and its general importance, both to the United States and the island territories, concurred to bring forward the merits without sufficient attention to the preliminary inquiry. I now submit the above results of the investigation on the point of jurisdiction without further argument or remark thereupon except this, that, on the whole, the tendency of this court and of subordinate tribunals which have applied its decisions seems to be that the executive authority has the right and power to pass upon all questions presented, including the question whether a particular applicant is an alien or not; and the decision of that authority upon this question is final—absolutely so when the statutory course of executive appeal has not been followed, and generally so until and unless a competent court, after the executive remedy has been fully pursued, sees fit, because of peculiar and meritorious circumstances in the particular case,

to grant the remedial writ and draw over into the courts the jurisdiction otherwise exclusive and conclusive in the executive authority.

II.

ADDITIONAL COMMENT ON THE MERITS.

I endeavored to make it very clear in my brief and argument that I did not speak of the native inhabitants of Porto Rico as uncivilized. That the withholding of citizenship and the postponement of determining the exact status of the various island peoples were intended to include former Spanish subjects, natives of the peninsula, as well as the native inhabitants in the strict sense, is perfectly evident from the treaty and the laws and the protocol interchanges between the American and Spanish commissioners. The Spanish commissioners were simply endeavoring to obtain for all the inhabitants of the ceded territory the same right of preserving allegiance to Spain which was conceded to Spanish-born subjects of Spain. Not electing to preserve the allegiance to Spain, these "Peninsulars" were declared by the treaty to have adopted the nationality of the local territory, and thereupon they are necessarily assimilated in respect to civil rights and political status to the native inhabitants. The rights of all the inhabitants, in other words, coming under the allegiance and protection of the United States and possessing the nationality of the territory, shall be

determined by the Congress; and all such people are citizens of Porto Rico, and with the entirely distinct class of citizens of the United States residing in Porto Rico, constitute the body politic named The People of Porto Rico. The language of the law (sec. 7 of the Porto Rican act), amplifying the treaty stipulation, is that all inhabitants who were Spanish subjects on the crucial date, and then resided in Porto Rico and continued to reside there, with their children born subsequent to that date, excepting "Peninsulars" who had duly elected to preserve their allegiance to Spain, shall be deemed and held to be citizens of Porto Rico, etc.

I also endeavored to make it very clear that in discussing the motives and purpose of Congress in the alien-exclusion legislation, and emphasizing certain peculiar oriental and tropical dangers in the situation, I indicated a general view of the subject. I said that the standards of life and conduct in the Orient and Tropics, owing to many different conditions, were different from rather than inferior to our own. But it is obvious that in our own view at least, exercising our sovereign power and discretion to protect ourselves, the standards of the equator are less advanced than our own, however strongly individual examples and exceptions may show the contrary. It is not mere self-complacent satisfaction for an American to be aware of this general truth and the perfectly patent fact,

and there is no animadversion against any particular civilization or race in pointing it out as a well-known and existing fact upon which Congress proceeded in its legislation. At all events, no personal or racial susceptibilities could justly be touched simply because I suggested that the excluded defects and disabilities were more prevalent under the various conditions of climate and population in the Far East and the Far South than with us. We have too many defectives ourselves, but that is no reason why we should admit those from elsewhere.

I am not so foolish as to argue that the Government case can be made out by insisting upon ambiguous definitions. But such definitions manifestly indicate, as I said, that we can not be bound and held to mere words in this inquiry. I pointed out how, if we stand on literal terms, the definition of *alien* in Bouvier would include the woman here. Suppose, for another illustration of the vice in literalness, we take the definition given by the learned counsel from the Encyclopædia of Law (p. 10 of Mr. Coudert's brief): "An alien is a foreigner, a person resident in one country but owing allegiance to another." By the force of this, if we put out of sight for a moment the peculiar Federal relation—I mean the national interrelations in this novel situation between the United States and its island territories—a native inhabitant is an alien, a foreigner in the abstract, because he is resident in one country, Porto Rico, but he

owes allegiance to another, the United States. It will be recalled that Article XI of the treaty refers to the courts of *the country* and citizens of the country, speaking of these territories. And again this definition, if literal reading is insisted upon, might be construed to classify a native inhabitant as an alien *quoad* his own country, because, though resident there, he owes allegiance to another. Of course I know that such readings are *reductio ad absurdum*, because the meaning of *country* and *another* in that definition imports diverse sovereignties. But the very absurdity shows that in dealing with this unprecedented situation we must not be ruled by the mere symbols of the real concepts, or we shall undoubtedly stick in the bark.

As I construe and understand it, Mr. Coudert's argument simply states these propositions: That the word "citizen" has several meanings, a general one corresponding to subject and conveying merely the idea of membership in a nation, and a particular one implying the possession of complete political rights indicated by the phrase "active citizens;" that under the Norman or Saxon law rule of the *jus soli*, as distinguished from the civil rule of *jus sanguinis*, all persons born within the allegiance are subjects or citizens; and so are those taken over by conquest, acquisition, or cession, the relation of the latter class shifting again if there is a retrocession or other separation of the particular territory from the Crown; that since

the native inhabitants clearly owe allegiance and are entitled to protection, they have become American nationals, their "nationality" is American, by which word is signified "the element of homogeneity, by which all these people are united, regardless of internal and sectional differences, into a great nation, owing allegiance to a common government, as against all the other governments of the world" (Butler, Treaty-making Power, vol. 1, p. 16, note); that the change of allegiance, while it made the Porto Rican born before the cession a national or subject, did not necessarily make him a citizen; but that on the whole it is more compatible with sound political science and with public law, as well as with the spirit of our own laws, to hold that, notwithstanding the treaty reservation, the cession drew after it the result of transferring the allegiance of the inhabitants when the previously foreign territory became domestic, and of naturalizing the natives as citizens of the United States (*passive* citizens), entitled to all the rights, privileges, and immunities of such.

I have no objection to urge against any part of this argument except the conclusion. The extreme view that citizenship has been conferred is manifestly impossible to sustain. This case does not, of course, require the determination of that question, and the particular point presented is much narrower. I submit that consistently with Mr. Coudert's entire argument, excepting the untenable claim of collective naturalization by the

treaty, the result contended for by the Government stands, viz, that those who have become nationals merely so far as respects general allegiance and general protection have not lost their previous alien character by birth and race and on every other test so as to be entitled to unrestricted ingress into this country under the circumstances presented and the laws involved. This result, and not the learned counsel's result of necessary escape from the statutory disabilities of alienage, follows from the premises. For what is shown by their own illustrations from foreign analogies and international law? Simply that France recognizes peoples who have become subject to her as nationals in this same general sense, which is strictly limited by the correlative duty and right of allegiance and protection; that France on the whole has treated such nationals fairly, but not so fairly and liberally as we have treated the corresponding nationals who have come under our laws; that it required a legislative *décret* to confer French citizenship upon a particular and enlightened section of the Algerian inhabitants, roughly corresponding, I presume, to the "Peninsulars" among our "citizens of Porto Rico" or the Philippines; and that it required another law to confer and recognize even nationality (*de plein droit*) upon the Taïtans.

Non constat that the native inhabitants of Algeria or Tonquin who have not been affirmatively endowed with citizenship would have a free right of

entry into France. It nowhere appears that they have, although if it were so that fact would not be conclusive upon our situation.

Chief Justice Marshall, in *American Insurance Co.* v. *Canter*, intimated that under general principles of law the inhabitants of Florida were entitled, without the treaty stipulation, to the privileges, rights, and immunities of citizens in the more extended sense of the term, recognizing, in other words, the right of the inhabitants of an acquired territory to enjoy protection and liberty under the general principles of enlightened public law. This suggestion states the modern view and practice which the Florida and Louisiana treaties explicitly recognized. A review of the cases arising under those treaties, and of the recent insular decisions, shows conclusively, I think, underneath all the particular divergences of opinion, that in those cases a promise had been given in accordance with the enlightened attitude of all civilized nations, and agreeably to the spirit of our own institutions; that this promise was carried into effect through successive stages; first, of unorganized territorial government; next, of organized government of Territories in the full and formal sense; and last, of admission to statehood, which finally, in the complete sense, extended the rights of citizenship. Until this last point was reached the inhabitants were not truly citizens, and, indeed, were manifestly regarded, when the question was

raised, as aliens. This is the view of the *Laverty* case, which held that the effort of the Government after the admission of Louisiana into the Union, to continue to treat as aliens persons of foreign birth who had long been *bona fide* inhabitants of the Territory of Orleans, was an extreme extension of the principle and could not be sustained. But the necessary inference from that decision is that, until statehood had been attained, such inhabitants were in fact aliens, although, as in the case of Ohio, the people of the Territory, the real inhabitants, who were authorized to form a State government, consisted partly of citizens of the United States resident there and partly of foreigners. The precise point decided was that the inhabitants authorized by the law to form a State government were those who came into the Territory after the date of the treaty as well as those who were there at that time. But the import of the ruling is that until the admission of the State naturalized all of the *bona fide* inhabitants collectively, neither the treaty nor the intervening laws, while protecting them, moved them beyond the status of aliens.

The opposing brief asks what *commodum* has fallen to the petitioner in compensation for her burden. We might more justly ask what burden has been cast upon her, for counsel is speaking merely of her subject relation and not at all of the alien disability. At least the burden and benefit

are mutual and march together—the burden of allegiance, if it is one, and the benefit of protection. The benefit is the *nationality*, which in the international field we have conferred—the nationality of the particular territory and American nationality in general, because the territory is domestic and appurtenant to the United States.

It has reasonably been thought that the change of allegiance and nationality worked a great benefit, because the rule of Spain, even in modern years, was onerous and not helpful; was mainly for the benefit of the Crown in the end, and indifferent to the claims of local autonomy. A certain appearance of independence was extorted as the *dernier ressort* of a shaken and tottering government, but it was shadow and not substance. I think the United States has recognized and honored in full measure the claim of a *commodum* due to the petitioner and all other native inhabitants.

The decision of the Attorney-General (24 Op., 40) that a native Porto Rican, temporarily living in France on April 11, 1899, is a citizen of Porto Rico, and as such is an "American artist" whose paintings are entitled to certain privileges under the tariff act of 1897, was the logical and natural consequence of the change of allegiance, of the new right of protection. The decision does not go beyond recognition of the local nationality as *pro tanto* "American," and is entirely consistent with the similar rulings of the State Department set forth in my main brief.

Let us note again the reservation—"civil rights and political status." I do not know how language could more broadly cover the entire field, or show more irresistibly in connection with the previous immigrant exclusions and the cautious attitude of the treaty negotiators and of Congress, the general conception that in this entire subject the *status quo ante* was not to be changed. Of course the intention could be more explicitly phrased, and the court will determine the point on the terms of the various laws in connection with all the circumstances, irrespective of any theory that Congress consciously meant or unconsciously assumed the result for which I am contending. Nevertheless, I think that inference is necessary when all the facts are regarded. Among the civil rights and the elements of political status are manifestly included the relations of the island citizens to the body of the country, the nature and extent of the native citizenship rights in the island *locus*, the larger and later questions of national citizenship, statehood, Federal franchise, etc. These matters reveal no more obvious, necessary, and important feature than the privilege of freely entering the United States. Why is not that right, which is only denied to the relatively few inhabitants who both desire to come to this country and are afflicted with alien disabilities, included in the *civil rights* reserved?

Those who do not come or coming are excluded enjoy under the authority of the United

States, in the country of which they are citizens, all the fundamental rights of liberty and protection, for it has not yet been determined that trial by jury in the Philippines is such a fundamental right. They possess most of the rights of citizens of the United States. Those entitled to come here will receive the full protection and rights which aliens in common with citizens enjoy. Pending enlargement of the islanders' rights in their own countries or here, if or when Congress shall determine to augment the local scope in the Federal scheme, or extend the Federal citizenship to the local citizens by some method of collective naturalization—pending such events, I say, these new American nationals are differentiated in all the rest of the world from those who are total aliens to us by the protection which the United States has fully and willingly assumed among its international obligations. No prediction in this matter of the future is proper or possible, but I hazard the suggestion that the outcome will exhibit an orderly evolution and new application of the *Federal* principle—the notion of *federated* commonwealths responsive rather than tributary to the central guidance—and will not exhibit a republic's repetition of the monarchical government of dependencies.

It has been suggested as ridiculous that these nationals, in order to come within our uniform law of naturalization, are required to renounce

allegiance to the foreign state of which they may be at the time of declaring intention citizens or subjects (sec. 2165, R. S.), which these peoples can not do because the treaty itself in effect, by Article IX, transferred allegiance from Spain to the United States. It is suggested by this that these nationals are in a worse position than complete aliens.

It certainly is competent for Congress to provide a particular form of renunciation which would be a constitutionally uniform rule if applied to all nationals, having the effect of confirming in each individual case the general transfer or renunciation of the Spanish allegiance which the treaty effected. Such action by Congress would explicitly register the national or subject relation created by the treaty and laws. As Congress could do this relative to nationals coming into this country and desiring to become citizens and to reside here, so Congress could go further and authorize naturalization as Federal citizens in the islands themselves, whereupon free movement throughout any part of the country or its possessions would supervene.

To point out the present incongruity and ridicule it, however, is simply to beg the question, because, strange and unprecedented as the dilemma may be, this is precisely what was reserved, and the matter must continue in this anomalous state until Congress does, in fact, see fit to make

appropriate provision for the peculiar situation. It can not be doubted that Congress will at least speedily correct any discrimination in favor of aliens and against nationals legally resident here.

In many other ways than by the treaty and the organic laws for Porto Rico and the Philippines is it shown that any extension of the local rights and privileges, personal and general, requires a specific enactment. An examination of the various laws enacted by Congress during the past three years abundantly illustrate this view. For instance, in the army appropriation act of March 2, 1903 (32 Stat., pt. 1, pp. 927, 934), it is provided "that citizens of Porto Rico shall be eligible for enlistment in the Regular Army, and the Porto Rico regiment may be ordered for service outside of the island of Porto Rico." Under the general law applying to enlistment (act of August 1, 1894. 28 Stat., 215) only citizens of the United States, or those who have declared their intention to become citizens, are eligible for first enlistment in the Regular Army. The explicit nationalization of Porto Rican vessels and admitting them to the coasting trade (sec. 9, act of April 12, 1900), furnish another illustration of the principle. The argument of the other side is that because such special concessions have been explicitly given the whole case has been conceded; but manifestly that is not so. In respect to the present contention the islanders are aliens despite the special allowances, and are not citizens because of them.

Mr. Coudert italicizes, on page 28 of his brief, the following quotation from Cogordan on nationality: "Every national, indeed, is not a citizen, although every citizen is a national." I fully agree to the statement, and merely suggest that it may be completed so as to recognize the entire sovereign rights, and yet without inconsistency with principles of general law, by the following addition: *Some nationals, native and residing in remote territorial possessions, may be regarded as aliens as to particulars of domestic police and security, including the matter of ingress into the home country.*

Responding to a query from the bench, I am aware of no other region than that covered by the alien exclusions in which the Government contention would require us to treat native inhabitants as aliens. The reservations of the law, manifestly and constitutionally withholding complete citizenship and its vital characteristics, even if native inhabitants are not aliens in *any* respect, cover the rest of the ground.

This case has been regarded, and is submitted here by opposing counsel as involving a hopeless incongruity, an irreconcilable antinomy—to borrow a theological term. The essential fairness of the attitude of the United States is apparent as soon as we leave the logical fencing over the doctrines of international law and the dialectics based upon the definition of a word. There are no such comprehensive and exclusive categories, as counsel assert,

to be settled by the rules of a formal logic founded in the scholasticism of the past. The attitude of the United States simply is that dangerous or feeble defectives among our island inhabitants are not to be admitted to this country as if they were citizens. That is a just, natural, and reasonable attitude under all the circumstances presented. I submit, finally, that the supposed incongruity and antagonism are dissipated by the following statement: That former aliens by birth and race now under our sovereignty and protection in appurtenant domestic territory, and for that reason alone "nationals" of this country, are still aliens respecting proper immigrant exclusions, when the Spanish treaty and consequent laws preserved the *status quo ante*, and Congress has not affirmatively removed the ban.

HENRY M. HOYT,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

ISABELLA GONZALEZ, APPELLANT,
v.
WILLIAM WILLIAMS, UNITED STATES commissioner of immigration at the port of New York. } No. 225.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX TO SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

APPENDIX A.

United States district court, district of Vermont.

IN RE MOY QUONG SHING ET ALS. ON HABEAS CORPUS.

(Not yet reported.)

OCTOBER 10, 1903.

WHEELER, J.

The persons detained are of the Chinese race, lately from China, and are restrained of their liberty at the port of Richford, where they sought to enter this country.

The petition set forth restraint in a detention house by persons acting as officers of the United States, and challenged their authority and the legality of their proceedings. The return of the petitionee, Weeks, shows that he is an officer of immigration, detaining the men under direction of Officer Schell, whose return, filed by leave of court, shows that he is an officer of immigration under control of the Commissioner-General in charge of this port by designation of the Secretary of Commerce and Labor. This seems to show regular and sufficient authority, within the act of 1903 (32 Stat., 828), placing jurisdiction in the Department of Commerce and Labor.

The proofs show that the men came by train and presented themselves for admission, and when reached were informed that they would then be examined as to their right to come in, and that, being questioned through an interpreter, they said they had been told by their parents that they were born within the United States, of which they had no recollection, and claimed to come in as native-born citizens. That such citizen, of whatever race, on arriving at a port of this country is entitled to come is not questioned or questionable. The contention now is that when such a claim is made the executive officers have not authority to pass upon it, and that it must go for decision, if denied, to courts or judicial officers on some proper proceeding, of which this is said to be one. That the legislative department may exclude any race or classes of any race not citizens from the country, and identify and return those not entitled to come by executive as well as judicial officers seems to be too well settled by numerous and uniform decisions

of the Supreme Court to require or warrant citations. And in *Chin Bak Kan* v. *United States* (186 U. S., 193) Mr. Chief Justice Fuller for the court said, after referring to *United States* v. *Wong Kim Ark*, where it was held that Chinese persons born in the United States are citizens:

> It is impossible for us to hold that it is not competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends under that decision.

It seems equally impossible to hold that when Congress can commit the execution of the law and the decisions of questions arising therein to the decision of executive officers it can not also include the fact as to place of birth. The judicial powers of a commissioner are wholly conferred by act of Congress; and power to decide questions arising in executive proceedings may as well be conferred upon executive officers as upon others. These questions as to the place of birth of these applicants arose for decision with other questions before this officer, and no other way but for him to decide them is made apparent.

It is claimed that the proceedings of this immigration officer, Schell, did not so conform to the rights of the applicants that the detention pursuant thereto was lawful. In the *Japanese Immigrant Case* (189 U. S., 86, at 100), Mr. Justice Harlan said:

> But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of

law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury, or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country and has become subject in all respects to its jurisdiction and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

It appears that the immigration officer is governed by Chinese regulations made by the Department of Commerce and Labor, among which are:

> Rule 6. Immediately upon the arrival of Chinese persons at any port mentioned in rule 4 it shall be the duty of the officer in charge of the administration of the Chinese-exclusion laws to adopt suitable means to prevent communication with them by any persons other than officials under his control, to have said Chinese persons examined promptly, as by law provided, touching their

rights to admission, and to permit those proving such right to land.

Rule 7. The examination prescribed in rule 6 should be separate and apart from the public, in the presence of Government officials and such witness or witnesses only as the examining officer shall designate; and if, upon the conclusion thereof, the Chinese applicant for admission is adjudged to be inadmissible, he should be advised of his right of appeal and his counsel should be permitted, after duly filing notice of appeal, to examine, but not to make copies of, the evidence upon which the excluding decision is based.

Rule 21. The burden of proof in all cases rests upon Chinese persons claiming the right of admission to or residence within the United States to establish such right affirmatively and satisfactorily to the appropriate Government officers, and in no case in which the law prescribes the nature of the evidence to establish such right shall other evidence be accepted in lieu thereof, and in every doubtful case the benefit of the doubt shall be given by administrative officers to the United States Government.

It also appears that in these cases the officer in charge, with commendable care, informed each applicant that other witnesses would be heard and sent for, if there were any, and that no claim was made that there were any.

In the *Japanese Immigrant case* Mr. Justice Harlan further said:

> The traverse to the return made by the immigration inspector shows upon its face that she was before that officer, pending the investigation of her right to be in the United

> States, and made answers to questions propounded to her. It is true that she pleads a want of knowledge of our language; that she did not understand the nature and import of the questions propounded to her; that the investigation made was a "pretended one," and that she did not at the time know that the investigation had reference to her being deported from the country. These considerations can not justify the intervention of the courts.

Here the applicants presented themselves for examination for admission, and were held till, and were present when, it was had, and knew what was going on. They came for the examination, and should have come prepared with any evidence they had and wished to introduce to maintain their claims. That others were kept from them before or during the examination, or any prejudice to them in consequence of the rule, is not shown. They had, so far as appears, all the examination they wanted.

The rule of evidence prescribed may put upon the applicants more than proof to the satisfaction of the officer and require that beyond doubt; but the rules of evidence go with the authority to decide, and are included in it; and their correctness or their application furnishes no ground for interference.

Persons remanded.

APPENDIX B.

United States circuit court, northern district of New York.

IN THE MATTER OF SING TUCK, OR KING DO, AND THIRTY-ONE OTHERS.

RAY, District Judge.

The petitioners, Chinese persons, 32 in number, apply for discharge from custody in the Detention House at Malone, N. Y., on *habeas corpus*, alleging that they are citizens of the United States, illegally restrained of their liberty and illegally detained by Thomas Darcy, Chinese inspector of the United States of America, at Malone, N. Y., in what is known as "The Detention House." The petition for the writ is made by the attorney for the petitioners on information and belief.

It is admitted that the petitioners are Chinese persons; that they came from China and applied for admission into the United States at the port of Malone, N. Y., and were denied admission by the executive officers of the Government of the United States duly authorized to act and acting under and by virtue of the Chinese exclusion laws on the ground that they are citizens of China and not of the United States, and not shown to be within the classes entitled to admission. The petitioners were duly notified of their right to appeal from the decision refusing them admission to the Secretary of Commerce and Labor of the United States.

The petitioners have taken no appeal, but swear out a writ of *habeas corpus* in this court, alleging that they were born in the United States under circumstances making them citizens of the United States and that, as such, they have the right to have that fact tried and determined in the courts of the United States and by the judicial department of the Government, and that this question of citizenship can not be determined by the executive officers of the Government, at least, so as to bind them and deprive them of their right to appeal to the courts for a due trial and determination of that question of fact; that "due process of law" guarantees them this right.

When they applied for admission twenty-six of the petitioners stated that they were Chinese persons and made application for entry but refused to answer any other questions touching their right to enter. The other petitioners, six in number, stated that they were Chinese persons, applied for entry into the United States, and also stated that they were born within the United States, and refused to answer any other questions. No one of the petitioners offered to show citizenship, or to comply with the law relating to the entrance of Chinese persons into the United States.

The return to the writ shows the above facts, but denies that the petitioners are citizens of the United States or were born therein, and alleges in effect that the determination of the immigration officers and Chinese inspectors, not appealed from, is final and conclusive on the question of citizenship as well as all others involved, and that that question was necessarily involved and adjudicated in the determination made.

On the return of the proceedings under the writ, the United States district attorney for the northern district of New York, intervening in behalf of the United States and appearing in behalf of said Chinese inspector to whom the writ was directed, moved that the writ be dismissed and the petitioners remanded on the following grounds:

> First. This court has no jurisdiction to review the determination of the immigration officers of the United States in denying to the petitioners herein the right to enter the United States.
>
> Second. That the determination of the immigration officers on the question of the right of the petitioners to enter the United States is final and conclusive, no appeal having been taken therefrom to the Secretary of Commerce and Labor.
>
> Third. That it is not established by the petition and return that the petitioners, or any of them, have a lawful right to enter the United States.
>
> Fourth. That the facts set forth in the petition and return show that the petitioners have no legal right to enter the United States.
>
> Fifth. That the petitioners are not unlawfully detained or deprived of their liberty.

This court will take testimony and determine the question of citizenship unless the decision of the inspector acting under the Commissioner-General of Immigration and the Secretary of Commerce and Labor, not appealed from, is final and conclusive, *res adjudicata*, on the question of the citizenship of the petitioners, provided that question has been properly raised and presented by the record.

The one question is, Has Congress the constitutional power to confer upon the executive department, the executive officers of the Government, jurisdiction to try and finally determine adversely the question whether a person seeking to enter the United States is a citizen thereof and, as such, entitled to enter? Is this a political question? The other question is, Have the petitioners, or either of them, placed themselves in a position to raise this question of citizenship in this court?

That Congress has full authority to confer upon the executive officers of the Government plenary power to exclude and deport aliens of any nationality is settled.

Fong Yue Ting v. *United States*, 149 U. S., 698.

Wong Wing v. *United States*, 163 U. S., 228.

Chae Chan Ping v. *United States*, 130 U. S., 581.

Nishimura Ekiu v. *United States*, 142 U. S., 651–659.

Japanese Immigrant Case, 189 U. S., 86.

Lem Moon Sing v. *United States*, 158 U. S., 538.

It is claimed that the power to exclude and deport aliens necessarily includes the power to try and determine the question whether the person excluded or proceeded against is an alien. While Congress has the power to provide for the exclusion and deportation of aliens, and may fix the terms and conditions on which aliens may enter the United States or remain, being here, and also has the power to confer the authority to determine whether those terms and conditions have been complied with on executive officers of the Govern-

ment, it does not necessarily follow that, for purposes of exclusion or deportation, the power to determine *who are aliens and who are citizens* may be conferred by Congress on the executive officers or Executive Department of the Government.

The one question is, whether persons conceded to be *aliens* shall be admitted at all, or on or under certain conditions, the existence of which conditions is matter of proof, or deported if certain conditions have not been complied with, etc., and in no sense determines or adjudges the question of citizenship, which is not in issue, while the other question is one that involves the status, liberty, and property rights of the person or persons refused admission or proceeded against. A citizen has the right to live in the country of which he is a citizen; to go and come as he pleases, even to go to and return from a foreign country if he conforms to the quarantine and other laws on the subject, and to own property and exercise many rights not belonging to an alien, unless banished as a punishment for crime. The right to refuse all aliens admission into the United States is conceded.

A citizen of the United States can not constitutionally be refused admission. Aliens found in the United States may be deported simply because they are aliens.

A citizen of the United States can not, in any event, lawfully be deported, unless as a punishment for crime of which he has been duly convicted after a fair trial by the judicial department of the Government. Nor can he be excluded from the country. As an attribute of sovereignty a sovereign nation, as a means of self-preservation, both in times of war and times of peace, must

have, and has, the right to determine who shall be citizens thereof, and what persons not being citizens shall be permitted to enter or reside within its territorial limits, and also fix the terms and conditions on which such persons may remain, and also change them at will. But once admitted to citizenship in the United States, the person so admitted becomes a party to the Constitution, entitled to the benefits of its guarantees of protection according to and under the laws adopted in conformity thereto. At first blush it would seem clear that a person claiming to be a citizen of the United States has the right to have that alleged fact, if disputed under circumstances involving his liberty and property rights, determined in the courts and according to the established rules and forms of legal procedure. If not so, then any citizen may be deported, in effect banished from the United States, if it is charged that he is an alien, and laws excluding and deporting all aliens are enacted, on the judgment of any executive officer on whom Congress may see fit to devolve the determination of the question of expulsion, etc., and consequently that of citizenship. If no appeal is provided such judgment would be final and conclusive and the form or mode of trial (in the absence of legislative enactment) might depend on the mere whim or caprice of the executive officer clothed with power in the premises. Has any decision of the Supreme Court of the United States gone to the extent of holding any such doctrine?

It may be well to cite some of the cases and quote the language of the court.

In the *Nishimura case* (142 U. S., 651) the court said:

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter in opposition to the constitutional and lawful measures of the legislative and executive branches of the National Government. As to such persons the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.

In *Lem Moon Sing* v. *United States* (158 U. S., 538) the court said:

> The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.

In *Fok Yung Yo* v. *United States* (185 U. S., 296–305) the court said:

> Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country.

In that case it was admitted that the petitioner was a subject of the Empire of China. On his arrival at the port of San Francisco he stated that he intended to pursue his journey to San Jose de

Guatemala. The collector refused to permit him to proceed further. *Habeas corpus* proceedings were then instituted. No question of citizenship was involved in that case, and it is clear under the decisions that the action of the executive officers was final and conclusive.

In the *Japanese Immigrant case* (189 U. S., 86) the court held:

> 2. It has been firmly established by numerous decisions of this court that it is within the constitutional power of Congress to exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions, and regulations to executive officers without judicial intervention.
>
> 3. An administrative officer, when executing the provisions of a statute involving the liberty of persons, may not disregard the fundamental principles of due process of law as understood at the time of the adoption of the Constitution. Nor is it competent for any executive officer, at any time within the year limited by the statute, to arbitrarily cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although illegally here, to be arrested and deported without giving such alien an opportunity, appropriate to the case, to be heard upon the questions involving his right to be and remain in the United States.
>
> Where, however, the alien had notice, although not a formal one, the courts can

not interfere with the executive officers conducting it. The objections of the alien to the form of the investigation could have been presented to the officer having primary control of the case, or by an appeal to the Secretary of the Treasury, and the action of the executive officers is not subject to judicial review.

But here no question of citizenship was involved.

In *Wong Wing* v. *United States* (163 U. S., 228) it was decided:

> Detention or temporary confinement, as part of the means necessary to give effect to the exclusion or expulsion of Chinese aliens, is valid.
>
> The United States can forbid aliens from coming within their borders, and expel them from their territory, and can devolve the power and duty of identifying and arresting such persons upon executive or subordinate officials; but when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

The court in its opinion said:

> We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.

In using the word "identifying" did the court mean to be understood as holding that it is competent for Congress to devolve upon executive officials the power to ascertain and determine who are and who are not aliens?

In *Nishimura Ekiu* v. *United States* (142 U. S., 651) it was decided:

> The act of March 3, 1891, c. 551, forbidding certain classes of alien immigrants to land in the United States, is constitutional and valid.
>
> Upon a writ of *habeas corpus*, if sufficient ground for the prisoner's detention by the Government is shown, he is not to be discharged for defects in the original arrest or commitment.
>
> Inspectors of immigration under the act of March 3, 1891, c. 551, are to be appointed by the Secretary of the Treasury.
>
> The decision of an inspector of immigration, within the authority conferred upon him by the act of March 3, 1891, c. 551, that an alien immigrant shall not be permitted to land because within one of the classes specified in that act is final and conclusive against his right to land, except upon appeal to the Commissioner of Immigration and the Secretary of the Treasury, and can not be reviewed on habeas corpus, even if it is not shown that the inspector took or recorded any evidence on the question.

In this case there was no pretense that the petitioner was a citizen of the United States.

In *United States* v. *Jung Ah Lung* (124 U. S., 621) the headnotes are as follows:

> A Chinese laborer, who resided in the United States on November 17, 1880, continued to reside there till October 24, 1883,

when he left San Francisco for China, taking with him a certificate of identification issued to him by the collector of that port, in the form required by the fourth section of the act of May 6, 1882, c. 126, 22 Stat., 58, which was stolen from him in China, and remained outstanding and uncanceled. Returning from China to San Francisco by a vessel, he was not allowed by the collector to land for want of the certificate, and was detained in custody in the port by the master of the vessel, by direction of the customs authorities. On a writ of *habeas corpus*, issued by the district court of the United States, it appeared that he corresponded in all respects with the description contained in the registration books of the custom-house of the person to whom the certificate was issued. He was discharged from custody, and the order of discharge was affirmed by the circuit court.

On appeal to this court by the United States, held:

(1) He was in custody under or by color of the authority of the United States, and the district court had jurisdiction to issue the writ.

(2) The jurisdiction of the court was not affected by the fact that the collector had passed on the question of allowing the person to land, or by the fact that the treaty provides for diplomatic action in a case of hardship.

(3) The case of the petitioner was not to be adjudicated under the provisions of the act of July 5, 1884 (c. 220, 23 Stat., 115), where they differed from those of the act of 1882.

(4) In view of the provisions of § 4 of the act of 1882 in regard to a Chinese laborer

arriving by sea, as distinguished from those of § 12 of the same act in regard to one arriving by land, the district court was authorized to receive the evidence it did in regard to the identity of the petitioner, and, on the facts it found, to discharge him from custody.

In *Lem Moon Sing* v. *United States* (158 U. S., 546, 547, 548) the court said:

> The contention is that while, generally speaking, immigration officers have jurisdiction under the statute to exclude an alien who is not entitled under some statute or treaty to come into the United States, yet, if the alien is entitled, of right, by some law or treaty, to enter this country, but is nevertheless excluded by such officers, the latter exceed their jurisdiction; and their illegal action, if it results in restraining the alien of his liberty, presents a judicial question for the decision of which the courts may intervene upon a writ of *habeas corpus*.
>
> That view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the Government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country, or to a class forbidden to enter the United States. Under that interpretation of the act of 1894 the provision that the decision of the appropriate immigration or customs officers should be final, unless reversed on appeal to the Secretary of the Treasury, would be of no practical value.

The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications. Is a statute passed in execution of that power any less applicable to an alien who has acquired a commercial domicile within the United States, but who having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to reenter it? We think not. The words of the statute are broad, and include "every case" of an alien, at least every Chinese alien, who at the time of its passage is out of this country, no matter for what reason, and seeks to come back. He is none the less an alien because of his having a commercial domicile in this country. While he lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country, and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he can not reenter the United States in violation of the will of the Government as expressed in enactments of the lawmaking power. He can not, by reason merely of his domicile in the United States for purposes of business, demand that his claim to

> reenter this country by virtue of some statute or treaty shall be determined ultimately, if not in the first instance, by the courts of the United States, rather than exclusively and finally, in every instance, by executive officers charged by an act of Congress with the duty of executing the will of the political department of the Government in respect of a matter wholly political in its character. He left the country subject to the exercise by Congress of every power it possessed under the Constitution.

In *Fong Yue Ting* v. *United States* (149 U. S., 713) the court said:

> The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the Government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution to intervene.

In substance this is the effect of all the decisions bearing on the subject.

This court finds no case decided by the Supreme Court of the United States holding that Congress may commit to the executive department under the interstate-commerce clause of the Constitution the right to determine finally the question of the citizenship of a person applying for admission into the United States.

In *United States* v. *Wong Kim Ark* (169 U. S., 649) the petitioner applied to the collector of customs at San Francisco for permission to land and enter the United States. He was refused

admission and restrained of his liberty by the collector, who decided that he was not entitled to enter. The petitioner claimed citizenship, and this was the question before the courts. It was decided that he was a citizen and discharged on that ground. His citizenship was denied and directly in question. It does not appear that the right of the courts to intervene was challenged, or that it was claimed that the decision of the collector was final or conclusive.

In *Chin Bak Kan* v. *United States* (186 U. S., 193) it was charged that the petitioner, a Chinese person, knowingly and unlawfully came into the United States and was not entitled to remain. He was informed of the charge against him and advised that he would be permitted to make a statement without or with oath, or refuse to make any statement or to answer any question put to him, and was entitled to reasonable time to send for counsel and to procure the attendance of witnesses. He denied the charges made, but admitted that he had just come into the United States. The hearing and trial was had before a United States commissioner, who decided that the petitioner was a Chinese person and a laborer, and that he unlawfully entered the United States as charged in the complaint and was not entitled to remain therein. It was accordingly adjudged that he be removed from the United States to the Empire of China. The petitioner gave no proof that he was a citizen of the United States or of any country other than China. From the judgment of deportation an appeal was taken to the district court of the United States where the judgment of deportation

was affirmed. On appeal to the Supreme Court of the United States it was held that it was competent for Congress to empower a United States commissioner to determine the various facts on which the citizenship of a Chinese person depends. The court held that—

> A United States commissioner is a quasi judical officer, and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the district court and his decision was affirmed, so that there was an adjudication by a United States judge in the constitutional sense as well as by the commissioner acting as a judge in the sense of the statute.

The court further said in the opinion:

> By the law the Chinese person must be adjudged unlawfully within the United States unless he "shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." As applied to aliens, there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements can not be avoided by the mere assertion of citizenship. The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed.
>
> Section 13 of the act of September 13, 1888, provides that any Chinese person, or person of Chinese descent, found unlawfully in the United States, may be arrested on a warrant issued upon a complaint under oath,

'by any justice, judge, or commissioner of any United States court," and when convicted, on a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, shall be removed to the country whence he came. "But any such Chinese person convicted before a commissioner of the United States court may, within ten days from such conviction, appeal to the judge of the district court for the district."

It seems to have been assumed during the years following the date of the act, and is conceded by the United States, that although most of its provisions were dependent upon the ratification of the treaty of March 12, 1888, and failed with the failure of ratification, that this section is in and of itself independent legislation and in force as such. Accordingly in this case an appeal was taken from the judgment of deportation rendered by the commissioner to the judge of the district court of the United States for the northern district of New York, and, upon hearing, the district court affirmed that judgment. From the judgment of the district court this appeal was taken under section 5 of the act of March 3, 1891, on the ground that the construction of the treaty of 1894 was drawn in question. Except in cases under that section where the question of jurisdiction alone is certified we have power to dispose of the entire case, but as the jurisdiction of the commissioner is sustained, we are of opinion that we can not properly reexamine the facts already determined by two judgments below. That is the general rule, and there is nothing to take this case out of its operation, and, on the contrary, the conclusion is a fortiori justified.

> The same reasoning in respect to the authority to exclude applies to the authority to expel, and the policy of the legislation in respect to exclusion and expulsion is opposed to numerous appeals. And we are not disposed to hold that where a Chinese laborer has evaded the executive jurisdiction at the frontier and got into the country, he is therefore entitled to demand repeated rehearings on the facts.

Article 5, amendments to the Constitution of the United States, provides, "No person shall be * * * deprived of life, liberty, or property without due process of law." * * *

We are thus brought to face with the proposition whether or not "due process of law" in determining the question of citizenship, when raised in proceedings to exclude or deport aliens, requires a trial and determination of the question in the courts of the United States by the judicial department of the Government? That to exclude from entry into the United States, or to deport therefrom, a citizen of the United States deprives him of life and property, in the constitutional sense, can not be successfully denied. Liberty includes not only the right to be out of prison, free to come and go, if the law is not violated in so doing, but to engage in all lawful pursuits, earn a livelihood, and own and enjoy property.

The powers or jurisdiction of the judicial department is thus defined by the Constitution, article 3, section 1:

> The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. * * *

> SEC. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority, * * * to controversies to which the United States shall be a party. * * *

The fourteenth amendment to the Constitution declares who are citizens, and, as we have seen, no person is to be deprived of life, liberty, or property without due process of law. When a citizen of the United States seeks to enter the country and is denied the right to enter and refused entrance by the executive officers acting under a law of Congress authorizing them to exclude and refuse admission to alien Chinese, or Chinese persons, and such refusal of admission is sought to be justified on the ground that the party seeking entrance is an alien, and not a citizen, and such person is then held in custody to be returned to China and he appeals to the courts alleging that he is illegally restrained of his liberty and that he is a citizen of the United States, and is held under the determination of a tribunal having no jurisdiction to pronounce it, do we not have "a case" arising under the Constitution, or a controversy to which the United States is a party? Does not the judicial power extend to this class of cases and these controversies? And, if so, may Congress devolve the determination of the questions involved on the application for admission on the executive officers of the Government and make their decision final? But when we consider that we have a Government divided into departments—legislative, executive, and judicial—the making, the execution, and the interpretation of laws being committed to each,

respectively, it is not strange that there is found occasionally an apparent conflict of authority. The determination of all questions of fact relating to controversies between the United States and citizens thereof does not necessarily devolve upon or belong to the judicial department of the Government. There are many cases where the other departments are the sole and final arbiters in such controversies.

See *Johnson* v. *Towsley*, 13 Wall., 72–83.
French v. *Fyan*, 93 U. S., 169–172.
Quinby v. *Conlan*, 104 U. S., 420–426.
Steel v. *Smelting Co.*, 106 U. S., 450–453.

The Supreme Court has decided what facts must exist to constitute a person born in the United States of alien parents a citizen thereof. This is a determination by the judicial department of what the law is and as to what facts must exist to create that status. When a person comes to our shores seeking admission as a citizen, must the existence or nonexistence of the facts alleged by him be determined by the judicial department, or may that department which has authority over the coming of persons into the United States determine whether or not such facts exist? May not it ascertain and determine who are and who are not aliens? Would the law be operative and effective if the power does not exist? If such department may do this, then the question here is, Did the executive officers named have jurisdiction to ascertain the facts on which the citizenship of the petitioners depend? And of this there can be no serious question.

It is conceded that the petitioners are Chinese persons. They came from the Empire of China,

and if born within the United States must have departed therefrom. They sought to return to and enter the United States, and having returned to our borders they applied for admission into the United States. They presented no proof of citizenship and made no pretense of compliance with the laws relating to and regulating the return to the United States of Chinese persons. It must be competent for Congress to enact laws regulating the departure from and return to the United States of its own citizens. By the Constitution, Congress has power to regulate interstate commerce, and this includes the coming of persons—any person—into the United States.

Congress, in the exercise of this power, has seen fit to enact:

> SEC. 4. That the master of any vessel arriving in the United States from any foreign port or place with any Chinese passengers on board shall, when he delivers his manifest of cargo, and if there be no cargo, when he makes legal entry of his vessel, and before landing or permitting to land any Chinese person (unless a diplomatic or consular officer, or attendant of such officer), deliver to the collector of customs of the district in which the vessel shall have arrived the sealed certificates and letters as aforesaid, and a separate list of all Chinese persons taken on board of this vessel at any foreign port or place, and of all such persons on board at the time of arrival as aforesaid. Such list shall show the names of such persons and other particulars, as shown by their open certificates or other evidences required by this act; and such list shall be sworn to by the master in the manner required by law in relation to the manifest of the cargo.

See section 4, act of September 13, 1888:

> SEC. 12. That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificates in this act required of Chinese persons seeking to land from a vessel.

See section 12, act of July 5, 1884:

> SEC. 12. That before any Chinese passengers are landed from any such vessel the collector or his deputy shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passengers shall be allowed to land in the United States from such vessel in violation of law; and the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States; and his decision shall be subject to review by the Secretary of the Treasury and not otherwise.

See section 12, act of September 13, 1888.

Was it not competent for Congress to make this law and make it applicable to all Chinese persons, whether citizens or aliens?

If so, then these petitioners were bound to show compliance with the law, and, not having done so, were properly denied admission.

Applying for admission, twenty-six of them made no claim of citizenship; the other six merely stated they were born in the United States, but made no statement and offered no evidence showing they were born in the United States under circumstances and conditions making them citizens. We have then a case of Chinese persons applying for admission into the United States

and making application to those officers authorized by law to identify Chinese aliens and refuse them admission. They made no claim and offered no proof of citizenship. Judgment having gone against them, as to their right to enter and necessarily as to their citizenship, they apply by counsel, who states on information and belief that they are citizens, for a writ of *habeas corpus*, seeking to try the question of their right to enter in the courts on a new plea or allegation of fact not before asserted by them. If this can be done every Chinese person applying for admission and refused can, by alleging citizenship, bring the matter into court and have this question determined by the judicial department of the Government and in the courts. It will be said there is no force in this proposition provided the petitioners have the constitutional right to appeal to the courts for a trial of this question of fact.

In *Chin Bak Kan* v. *United States* (186 U. S., 193) it was held that a United States commissioner is a *quasi* judicial officer, and that in the hearings under the Chinese exclusion laws he acts judicially. The court says: "But it is argued that the commissioner had no jurisdiction to act because the claim of citizenship was made." The court then states the facts necessary to make a Chinese person born in the United States a citizen of the United States, as held in *United States* v. *Wong Kim Ark* (169 U. S., 649), and then says: "It is impossible for us to hold that it is not competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends under that decision."

A United States commissioner is neither a court nor the judge of any court, nor is he vested by law with any part of the judicial power of the United States, for the judicial power is vested in the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish," and can not be vested in a commissioner, who is neither made a court, nor empowered to hold a court in the constitutional sense. True, he is an inferior officer of the court, appointed by it by authority of Congress, with defined and circumscribed powers, but no part of the judicial power of the United States is vested in him, nor can it be.

United States v. *Case*, 8 Blatch. (U. S.), 250.
United States v. *Schuman*, 2 Abb. (U. S.), 523.
In re Kaine, 14 How. (U. S.), 103.
United States v. *Clark*, 1 Gall. (U. S.), 497.

In *United States* v. *Case* (*supra*), Woodruff, J., said: "The commissioner holds no court. He acts simply as an arresting, examining, and committing magistrate."

In *United States* v. *Schuman* (*supra*), Field, J., said:

> The powers conferred are judicial in their nature, for judgment and discretion must be exercised, but they are not judicial in the sense in which judicial power is granted by the Constitution to the courts of the United States.

In *United States* v. *Clark* (*supra*), held, that a judge of the United States court, sitting as an examining magistrate, is not a court.

If, then, it is competent for the Congress to commit to United States commissioners the determina-

tion of the various facts on which the citizenship of a Chinese person depends, why is it not competent for Congress to commit to executive officers appointed by the heads of departments having jurisdiction of immigration and interstate commerce the determination of the facts on which the citizenship of Chinese persons applying for admission into the United States depends? All are inferior officers of the Government and possess those powers and those only which Congress confers. If in determining such a question a United States commissioner acts judicially and is a *quasi* judicial officer (because of his powers and duties, not because Congress devolved his appointment on the courts), why are not the executive officers duly empowered by Congress to hear and decide and pronounce judgment in these cases fully as much *quasi* judicial officers, and why do not they, too, act judicially in hearing and deciding these cases?

Neither the commissioner nor the inspector, etc., is exercising the judicial power of the Government, for it is not vested in either of them, and, as said, can not be. The Constitution, as we have seen, vests this power in the courts alone. It follows that a United States commissioner, in determining the various facts on which the citizenship of a Chinese person depends, while acting judicially, is neither possessed of nor exercising any part of the judicial power of the United States, and that under the holding in *Chin Bak Kan* v. *United States* it is competent for Congress to confer upon any inferior officer of the Government, especially those appointed by the Department of Commerce and Labor, which has power to regulate the coming of all persons into the United States, plenary

power to determine the various facts on which citizenship depends (so far as they relate to persons applying for admission into the United States), and that an appeal may be taken to the Secretary of Commerce and Labor, whose decision shall be final. If no appeal is taken, then the determination of the inferior officer is of course final, *res adjudicata*, of those facts. (*Chin Bak Kan* v. *United States*, 186 U. S., 193.)

Judgment has been passed by those officers competent and duly authorized and having jurisdiction to pronounce it, and this court is without power in this proceeding to annul or reverse it. The petitioners are not deprived of their liberty without due process of law, for they have had a competent tribunal in which to be heard, a hearing with opportunity to present their evidence, a judgment or determination, and the right of appeal, all according to the law of the land. This is due process of law.

In the *Japanese Immigrant case* (189 U. S., 86), at page 100, Mr. Justice Harlan said (speaking of due process of law):

> No person shall be deprived of his liberty without opportunity at some time to be heard before such officers (those clothed with authority in the premises) in respect to the matters upon which that liberty depends, not necessarily an opportunity upon a regular set occasion and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.

Here was such an occasion and such a hearing. The petitioners can not complain, for when called

upon to speak, and when it was their duty to speak, they remained mute, refusing to present the facts calling for a favorable decision if such facts existed. The proceeding was not a criminal action in fact or in its nature. The petitioners applied for admission into the United States and were bound to come prepared to show their right to enter, that right being denied. There is no pretense that they were denied a hearing or an opportunity to present evidence. The officers duly authorized to act, and acting according to law, heard and considered all the evidence offered or presented, and then gave judgment.

It may be remarked that the constitutional power of the Department of Commerce and Labor, under the interstate and foreign commerce clause of the Constitution, seems to be broad enough to give Congress power to confer jurisdiction on its officers to determine all questions of the right of persons to enter the United States, including the facts on which depends that of citizenship.

It is not intended to hold, and this court is not to be understood as holding, that cases may not arise (extraordinary in their nature and facts) where an appeal to the courts in appropriate proceedings may not be had, but under the facts of this case as presented to the court, and as presented to the executive officers, noncompliance with the law on the part of these petitioners "can not be avoided by the mere assertion of citizenship" made at this time and in this manner. (*Chin Bak Kan* v. *United States*, 186 U. S., 193.)

The petitioners assert that there is a decided distinction between the laws committing the decision of these questions to United States commis-

sioners and those devolving the power on inspectors of immigration. It is pointed out that in the case of commissioners an appeal to and review by a judge of the district court and then by the higher courts is provided for or permitted, and, hence, that there may be a hearing in the courts of the United States which constitutes due process of law, while no appeal to a judge or the courts from the decision of the inspector is permitted, only an appeal to the Secretary of Commerce and Labor. The trial and determination of the questions involved are committed to United States commissioners, and their decisions are final if not appealed from. If this provision is invalid (does not accord due process of law), it is difficult to see how the hearing before an officer having no jurisdiction is validated by giving the right of appeal from his decision to the courts having jurisdiction in such cases. The record upon which the courts pass when the case comes up on appeal is made by the commissioner, and it is the correctness of his conclusions on the law and facts that is reviewed on appeal. The case is not tried and determined *de novo*. If the commissioner has no jurisdiction, then the Chinese person proceeded against has had no constitutional trial or hearing, and the illegal and unauthorized proceeding can not be validated by the action of any appellate tribunal, its power being confined to a review of the proceedings had before the commissioner.

It follows from these considerations that the petitioners are not illegally held or detained. The writ must be dismissed and the persons remanded. So ordered.

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Supreme Court of the United States.

No. 225.—October Term, 1903.

Isabella Gonzales, Appellant, vs. William Williams, United States Commissioner of Immigration at the Port of New York.	Appeal from the Circuit Court of the United States for the Southern District of New York.

[January 4, 1904,]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This is an appeal by Isabella Gonzales from an order of the Circuit Court of the United States for the Southern District of New York, dismissing a writ of *habeas corpus* issued on her behalf, and remanding her to the custody of the United States Commissioner of Immigration at the Port of New York. 118 Fed. Rep. 941.

Isabella Gonzales, an unmarried woman, was born and resided in Porto Rico, and was an inhabitant thereof on April 11, 1899, the date of the proclamation of the Treaty of Paris; she arrived at the Port of New York from Porto Rico, August 24, 1902, when she was prevented from landing and detained by the Immigration Commissioner at that port as an "alien immigrant," in order that she might be returned to Porto Rico if it appeared that she was likely to become a public charge.

If she was not an alien immigrant within the intent and meaning of the act of Congress entitled "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," approved March 3, 1891, 26 Stat. 1084, c. 551, the commissioner had no power to detain or deport her, and the final order of the Circuit Court must be reversed.

The act referred to contains these provisions:

"That the following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers or persons likely to become a public charge. . . .

"Sec. 8. That upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence, and destination of every such alien, before any of them are landed, to the proper inspection officers, . . . All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the Superintendent of Immigration, whose action shall

be subject to review by the Secretary of the Treasury. It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, and any such officer or agent or person in charge of such vessel who shall either knowingly or negligently land or permit to land any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeanor . . ."

"SEC. 10. That all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. . . .

"SEC. 11. That any alien who shall come into the United States in violation of law may be returned as by law provided, . . ."

The treaty ceding Porto Rico to the United States was ratified by the Senate, February 6, 1899; Congress passed an act to carry out its obligations March 3, 1899; and the ratifications were exchanged and the treaty proclaimed April 11, 1899, 30 Stat. 1754. Then followed the act entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," approved April 12, 1900. 31 Stat. 77, c. 191. The treaty provided:

"Article II.

"Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.

"Article III.

"Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line. . . ."

"Article IX.

"Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

By the constitution of the Spanish monarchy and the Spanish Civil Code, in force in Porto Rico when the treaty was proclaimed, persons born in Spanish territory were declared to be Spaniards, but Porto Ricans who

were not natives of the Peninsula, remaining in Porto Rico, could not, according to the terms of the treaty, elect to retain their allegiance to Spain. By the cession their allegiance became due to the United States, which was in possession and had assumed the government, and they became entitled to its protection. The nationality of the island became American instead of Spanish, and by the treaty, Peninsulars, not deciding to preserve their allegiance to Spain, were to be "held to have renounced it and to have adopted the nationality of the territory in which they may reside."

Thereupon Congress passed the act of April 12, 1900. That act created a civil government for Porto Rico, with a Governor, Secretary, Attorney General, and other officers, appointed by the President, by and with the advice and consent of the Senate, who, together with five other persons, likewise so appointed and confirmed, were constituted an executive council, at least five of whom should be "native inhabitants of Porto Rico;" and local legislative powers were vested in a legislative assembly, consisting of the executive council and a house of delegates to be elected.

The Attorney General, the Treasurer, the Auditor, the Commissioner of the Interior, the Commissioner of Education were to make report through the Governor to the Attorney General of the United States, the Secretary of the Treasury of the United States, and so on, to be transmitted to Congress; and all laws enacted by the legislative assembly were to be reported to Congress, which reserved the power to annul the same.

Courts were provided for, and, among other things, Porto Rico was constituted a judicial district, with a district judge, attorney and marshal, to be appointed by the President for the term of four years. The district court was to be called the District Court of the United States for Porto Rico, and to possess, in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States. And writs of error and appeals might be brought and taken from and to the Supreme Court of the United States.

Provision was also made for the election of a commissioner to the United States, to be paid a salary by the United States, but no person was eligible to such election "who is not a *bona fide* citizen of Porto Rico, who is not thirty years of age, and who does not read and write the English language."

By section 9 regulations were to be made "for the nationalization of all vessels owned by the inhabitants of Porto Rico;" by section 14 the statutes of the United States were generally put in force in the island; by section 16 judicial process was to run in the name of the President of the United States.

By section 7 the inhabitants of Porto Rico, who were Spanish subjects on the day the treaty was proclaimed, including Spaniards of the Peninsula

who had not elected to preserve their allegiance to the Spanish Crown, were to be deemed citizens of Porto Rico, and they and citizens of the United States residing in Porto Rico were constituted a body politic under the name of The People of Porto Rico.*

Gonzales was a native inhabitant of Porto Rico and a Spanish subject, though not of the Peninsula, when the cession transferred her allegiance to the United States, and she was a citizen of Porto Rico under the act. And there was nothing expressed in the act, nor reasonably to be implied therefrom, to indicate the intention of Congress that citizens of Porto Rico should be considered as aliens, and the right of free access denied to them.

Counsel for the Government contends that the test of Gonzales' rights was citizenship of the United States and not alienage. We do not think so, and, on the contrary, are of opinion that if Gonzales were not an alien within the act of 1891, the order below was erroneous.

Conceding to counsel that the general terms "alien," "citizen," "subject," are not absolutely inclusive, or completely comprehensive, and that, therefore, neither of the numerous definitions of the term "alien" is necessarily controlling, we, nevertheless, cannot concede, in view of the language of the treaty and of the act of April 12, 1900, that the word "alien," as used in the act of 1891, embraces the citizens of Porto Rico.

We are not required to discuss the power of Congress in the premises; or the contention of Gonzales' counsel that the cession of Porto Rico accomplished the naturalization of its people; or that of Commissioner Degetau, in his excellent argument as *amicus curiæ*, that a citizen of Porto Rico, under the act of 1900, is necessarily a citizen of the United States. The question is the narrow one whether Gonzales was an alien within the meaning of that term as used in the act of 1891.

The act excludes from admission into the United States, "in accordance with the existing acts regulating immigration other than those concerning

*Sections 7, 9, 14 and 16 were as follows:

"SEC. 7. That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the eleventh day of April, nineteen hundred, in accordance with the provisions of the treaty of peace between the United States and Spain entered into on the eleventh day of April, eighteen hundred and ninety-nine; and they, together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such."

"SEC. 9. That the Commissioner of Navigation shall make such regulations, subject to the approval of the Secretary of the Treasury, as he may deem expe-

Chinese laborers," certain classes of "aliens" of "alien immigrants" arriving at any place within the United States, in respect of all of whom it is required that the commanding officer and agents of the vessel by which they come shall report the name, nationality, last residence and destination before any are landed.

The decisions of the inspection officers adverse to the right to land are made final unless an appeal is taken to the Superintendent of Immigration, whose action is subject to review by the Secretary of the Treasury; and all aliens who unlawfully come into the United States in violation of law shall be immediately, if practicable, sent back, or may be returned as by law provided.

We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and that citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic law of whose domicil was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States, are not "aliens," and upon their arrival by water at the ports of our mainland are not "alien immigrants," within the intent and meaning of the act of 1891.

Indeed instead of the immigration laws operating externally and adversely to the citizens of Porto Rico, they were themselves put in force and effect there by section 14 of the act of April 12, 1900, as the Secretary of the Treasury was advised by the acting Attorney General, July 15, 1902, in respect of the act "to regulate immigration," approved August 3, 1882, 22 Stat. 214, c. 376; 24 Op. 86. The act provided for the collec-

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dient for the nationalization of all vessels owned by the inhabitants of Porto Rico on the eleventh day of April, eighteen hundred and ninety-nine, and which continued to be so owned up to the date of such nationalization, and for the admission of the same to all the benefits of the coasting trade of the United States; and the coasting trade between Porto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States."

"SEC. 14. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws, which, in view of the provisions of section three, shall not have force and effect in Porto Rico."

"SEC. 16. That all judicial process shall run in the name of 'United States of America, ss: the President of the United States,' and all criminal or penal prosecutions in the local courts shall be conducted in the name and by the authority of 'The People of Porto Rico;' and all officials authorized by this act shall before entering upon the duties of their respective offices take an oath to support the Constitution of the United States and the laws of Porto Rico."

tion of "a duty of fifty cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States. . . . The money thus collected shall be paid into the United States Treasury, and shall constitute a fund to be called the immigrant fund, and shall be used, under the direction of the Secretary of the Treasury, to defray the expenses of regulating immigration under this act, . . ."

By section 2 inspection was provided for, "and if on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, they shall report the same in writing to the collector of such port, and such persons shall not be permitted to land."

The department held that the duty collected in Porto Rican ports should be accounted for and credited to the "immigrant fund," as is done with collections upon alien passengers arriving at ports in the United States.

In *Huus* v. *New York & Porto Rico Steamship Company*, 182 U. S. 392, 396, we held that by section 9 of the act of April 12, 1900, "it was evidently intended, not only to nationalize all Porto Rican vessels as vessels of the United States, and to admit them to the benefits of their coasting trade, but to place Porto Rico substantially upon the coast of the United States, and vessels engaged in trade between that island and the continent, as engaged in the coasting trade."

Again, in respect of paragraph 703 of the tariff act of July 24, 1897, (30 Stat. 203, c. 11,) exempting "works of art, the production of American artists residing temporarily abroad," the Department of Justice held that Mr. Molinas, a native of Porto Rico, and an artist, temporarily living in Biarritz, France, and there on April 11, 1899, became, under section 7 of the act of April 12, 1900, a citizen of Porto Rico, and as such an American artist entitled to the privileges of that paragraph. 24 Op. 40.

The Attorney General, in his communication to the Secretary of the Treasury, among other things, said: "It will be observed that paragraph 703 above quoted does not mention citizenship, but uses the phrase 'American artists.' It is clearly not inconceivable for a man to be an American artist within the meaning of such a statute and yet not be a citizen of the United States." And after commenting on the effect of the temporary absence of Mr. Molinas at the time the treaty was proclaimed, the Attorney General concluded his opinion thus: "But even in supposing that a native Porto Rican like Mr. Molinas, temporarily absent at the date of the treaty, has been unintentionally omitted from section 7, he is undoubtedly one of those turned over to the United States by Article IX of the treaty to belong to our nationality. He is also clearly a Porto Rican; that is to say, a permanent inhabitant of that island, which was also turned over by Spain to the United States. As his country became a domestic country and ceased

to be a foreign country within the meaning of the tariff act above referred to, and has now been fully organized as a country of the United States by the Foraker act, it seems to me that he has become an American, notwithstanding such supposed omission."

The Attorney General applied the ruling in *De Lima* v. *Bidwell*, 182 U. S. 1, that "with the ratification of the treaty of peace between the United States and Spain, April 11, 1899, the island of Porto Rico ceased to be a 'foreign country' within the meaning of the tariff laws."

In that case we were all of opinion that the action was properly brought, because as the question was whether the goods were imported at all the case did not fall within the customs administrative act. *In re Fassett, Petitioner*, 142 U. S. 479.

And in the present case, as Gonzales did not come within the act of 1891, the commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary; and she was not obliged to resort to the Superintendent or the Secretary.

Our conclusion is not affected by the provision in the Sundry Civil Act of August 18, 1894, 28 Stat. 372, 390, c. 301, in relation to the finality of the decisions of the appropriate immigration or custom officers, or the similar provision in the act "to regulate the immigration of aliens into the United States," approved March 3, 1903, 32 Stat. 1213 c. 1012. The latter act was approved after the Gonzales litigation was moved, but it is worthy of notice that the words "United States" as used in the title and throughout the act were required to be construed to mean "the United States and any waters, territory or other place now subject to the jurisdiction thereof." § 33. The definition indicates the view of Congress on the general subject.

Gonzales was not a passenger from a foreign port, and was a passenger "from territory or other place" subject to the jurisdiction of the United States.

In order to dispose of the case in hand, we do not find it necessary to review the Chinese exclusion acts and the decisions of this court thereunder.

Final order reversed and cause remanded with a direction to discharge Gonzales.

True copy.

Test:

Clerk Supreme Court, U. S.